Supreme Court, U.S.
FILED

941621 MAR 30 1995

No. 9 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

*JANELL M. BYRD
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Petitioners

Questions Presented for Review

1. Whether a State -- that maintained a *de jure* segregated higher education system for more than a century; that for a generation after *Brown v. Board of Education* took few meaningful steps to dismantle the dual system, acting only when threatened by federal officials with loss of funding; that had not been released from its remedial obligations by federal authorities; that continued to operate the same racially identifiable institutions that existed under the dual system; and that had been unsuccessful in prior efforts to increase the low level of African-American enrollment and graduation at its historically white "flagship" institution or to alter the longstanding climate of hostility to blacks on that campus -- was justified in 1989, as part of its desegregation plan, in continuing to award a small number of scholarships to high-achieving African-American students at that campus.

2. Whether the court below erred in holding, contrary to the decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), that statistical evidence of underrepresentation lacks any probative value on the issue of discrimination unless every imaginable explanatory factor is included in the calculation.

3. Whether the Court of Appeals "departed from the accepted and usual course of judicial proceeding," SUP. CT. R. 10.1(a), disregarded the requirements of FED. R. CIV. P. 56(c), and misapplied the teachings of this Court when, after having found that there were genuine disputes about facts material to the parties' cross-motions for summary judgment, it not only reversed the trial court's summary disposition in favor of the defendant parties but also directed that on remand, summary judgment should be entered for the plaintiff.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Maryland's *de jure* segregated system of higher education 3

The Banneker scholarship program 6

Initial litigation 8

Proceedings after remand 10

The ruling below 14

REASONS FOR GRANTING THE WRIT

I This Case Presents Issues of Extraordinary National Importance 15

There Is A Compelling Need for Race-Conscious Remedial Action at UMCP ... 17

The Approach of the Court Below Allows Insufficient Room for Necessary Race-Conscious Remedial Steps 21

TABLE OF CONTENTS (continued)

Page

II The Decision Below Rests Upon A Wholly Erroneous View of Statistical Proof in Discrimination Cases that is Contrary to the Explicit Teaching of this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), a Ruling in Which This Court Reversed the Same Court of Appeals for the Same Error 24

III Since the Court Below Concluded that There Were Genuine Disputes about Facts Material to the Cross-Motions for Summary Judgment, It Acted Contrary to FED. R. CIV. P. 56(c) and the Decisions of this Court in Directing the Trial Judge to Enter Summary Judgment for the Plaintiff on Remand 26

Conclusion 30

Table of Authorities

Cases:

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 29

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 27n

Ayers v. Fordice, No. 4:75CV009-B-O (N.D. Miss. March 7, 1995) 19

Bazemore v. Friday, 478 U.S. 385 (1986) .... i, 19, 24, 26

Table of Authorities (continued)

Page

Cases (continued):

Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984) 24, 25

Brown v. Board of Education, 347 U.S. 483 (1954) ..... i, 5, 11, 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 27n

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 8, 9, 15, 17, 21

Firefighters v. Stotts, 467 U.S. 561 (1984) 16n

Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 F.2d 799 (6th Cir. 1986) 20

Hughes v. United States Dep't of Education, Civ. No. N-76-01 (D. Md. June 3, 1985) 5n

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 15-16

Knight v. State of Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), aff'd in part, rev'd in part, vacated in part and remanded, 14 F.3d 1534 (11th Cir. 1994) 20

Local 28 v. EEOC, 478 U.S. 421 (1986) 16n

Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986) 16n

Table of Authorities (continued)

Page

Cases (continued):

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 27

Mandel v. HEW, 411 F. Supp. 542 (D. Md. 1976), aff'd, 571 F.2d 1273 (4th Cir.), cert. denied, 439 U.S. 862 (1978) 5n

McCready v. Byrd, 195 Md. 131, 73 A.2d 8, cert. denied, 340 U.S. 827 (1950) 4-5

Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936) . . . 4n

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 29

United States v. Fordice, ___ U.S. ___, 112 S. Ct. 2727 (1992) 6n, 10, 17, 19, 26n

United States v. Louisiana, Civ. No. 80-3300 (E.D. La. Nov. 14, 1994) 20

United States v. Paradise, 480 U.S. 149 (1987) 16n

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 16, 18, 22

Statutes and Court Rules:

7 U.S.C. §§ 301 et seq. (1988 & Supp. V 1993) 4

20 U.S.C. § 3413 (1988) 5n

20 U.S.C. § 3441(a)(3) (1988 & Supp. V 1993) 5n

Table of Authorities (continued)

Page

Statutes and Court Rules (continued):

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000d 2, 8, 21

1878 Md. Rev. Code, Art. 27, §§ 95, 98 . . . . . 3n

1872 Md. Laws Ch. 377 . . . . . 3n

1870 Md. Laws Ch. 311 . . . . . 3n

1868 Md. Laws Ch. 407 . . . . . 3n

1865 Md. Laws Ch. 160 . . . . . 3n

Sup. Ct. R. 10.1 (a) i

Sup. Ct. R. 14.1(k) 2n

Fed. R. Civ. P. 52 29

Fed. R. Civ. P. 56(c) . . . . . i, 26, 27, 29

Other Authorities:

59 Fed. Reg. 8756 (February 23, 1994) 20n

59 Fed. Reg. 4271 (January 31, 1994) 6n

43 Fed. Reg. 6658 (February 15, 1978) 5n, 20n

Md. House J. 1141 (1867) 3n

Table of Authorities (continued)

Page

Other Authorities (continued):

Md. Sen. J. 808 (1867) 3n

Gil Kujovich, Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal, 72 Minn. L. Rev. 29 (1987) 17n

Carl T. Rowan, Dream Makers, Dream Breakers (1993) 4n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Monica Greene, *et al.*, defendant-intervenors in the trial court and appellees below,[1] respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Opinions Below

The initial opinion of the District Court is reported at 764 F. Supp. 364 (D. Md. 1991) and is reprinted in the

---

[1]The parties to this litigation are: Daniel J. Podberesky (the plaintiff); William E. Kirwan, President of the University of Maryland at College Park, the University of Maryland at College Park (UMCP) (the defendants); Monica Greene [the surname is misspelled in the Court of Appeals' caption], Maudlyn George, on her own behalf and on behalf of her daughter Allison George, Eileen Heath, Richard A. Dalgetty, Gerard W. Henry, Maisha Herren, Aletha S. McRae, on her own behalf and on behalf of her daughter Daletha McRae, and Charles L. Smith, III, on his own behalf and on behalf of his son, Charles Smith, IV (the defendant-intervenors).

Appendix[2] [hereinafter cited as "__a."] at 109a-138a. The opinion of the United States Court of Appeals for the Fourth Circuit reversing and remanding is reported at 956 F.2d 52 (4th Cir. 1992) and appears at 96a-108a. The opinion of the District Court on remand is reported at 838 F. Supp. 1075 (D. Md. 1993) and is found at 34a-95a. The opinion of the United States Court of Appeals for the Fourth Circuit, of whose judgment review is sought, is reported at 38 F.3d 147 (4th Cir. 1994) and is printed at 1a-29a. The Order of the United States Court of Appeals for the Fourth Circuit denying timely filed petitions for rehearing, three Judges dissenting, is reported at 46 F.3d 5 (4th Cir. 1994) and is reprinted at 30a-33a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Order denying the petitions for rehearing was entered December 30, 1994 (30a).

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the text of each is set out at 221a-222a.

Statement of the Case

This suit was brought by Daniel Podberesky, a white student of Hispanic descent who in 1989 was granted admission to the Fall, 1990 undergraduate class at the University of Maryland at College Park ("UMCP") but was

---

[2]Although defendant-intervenors Greene, *et al.* and defendants Kirwan and University of Maryland at College Park are filing separate Petitions for Writs of Certiorari, a single Appendix containing the rulings below and other materials required by SUP. CT. R. 14.1(k) has been prepared for both Petitions.

held ineligible to receive a Benjamin Banneker scholarship to the school because the Banneker program was limited to African Americans in accordance with a plan adopted by the State of Maryland to desegregate its institutions of higher education.[3]

Maryland's* de jure *segregated system of higher education

Maryland has a typically extensive history of segregation in higher education, dating to Colonial times.[4] The first public institutions of higher learning that received public funds (from 1782 to 1810) were open only to whites (UX 70 at 138). Later in the 19th century, the State resumed chartering and funding higher education institutions and professional schools which were available only to whites

---

[3]One of plaintiff's parents is from Costa Rica. He originally claimed that the Banneker Program at UMCP should have been available to persons of Hispanic descent, whom he asserted were also victims of prior discrimination, as well as to African Americans. This claim was not passed upon by the District Court nor presented to or decided by the court below. *Cf.* 764 F. Supp. at 378, 136a-137a (rejecting similar claim with respect to Key Scholarship program).

[4]State authorities admit that prior to 1865, despite having the largest number of free blacks of any southern state (UX 70 at 38), all of the educational opportunities provided by the State were "in favor of the white race" -- there being no colleges for blacks or evidence that the white institutions enrolled blacks (IX 4 at 127). (Citations in the form "UX __" and IX __" are to exhibits to the defendants' and defendant-intervenors' 1993 Motions for Summary Judgment.)

Following the Civil War, the legislature of the State of Maryland refused to ratify the Fourteenth Amendment to the Constitution, Md. Sen. J. 808 (1867); Md. House J. 1141 (1867), and in 1870 enacted a new Public Education Act extending free public education to "[a]ll white youth between the ages of six and twenty-one years" (previously limited to age nineteen) and maintaining separate schools for "colored children" between the ages of six and twenty. 1870 Md. Laws Ch. 311 (Public Education Act of 1870); *see also* 1865 Md. Laws Ch. 160; 1868 Md. Laws Ch. 407; 1872 Md. Laws Ch. 377; 1878 MD. REV. CODE, Art. 27, §§ 95, 98.

(*id.* at 138-39), including, in 1859, the Maryland Agricultural College (now UMCP), which became the State's land-grant institution under the 1862 Morrill Act, 7 U.S.C. §§ 301 *et seq.* (1988 & Supp. V 1993). The school was open only to white males until 1916, when it admitted white females. (UX 70 at 141-42). Between 1866 and 1909 four higher education institutions for blacks, all founded by religious groups, were chartered by the State but received little if any state aid (*id.* at 141).[5]

By 1937, the State Commission on the Higher Education of Negroes found that of the four schools providing education for blacks, only one was accredited and that instruction in all was "considerably inferior" to that in the white institutions; the Commission recommended that the only state college for blacks, Princess Anne Academy, "had far better be abandoned altogether than continue its present pretense as a college" (IX 4 at 11-12, 26-27). In response to pressure to address these inequities or desegregate, Maryland chose to pay for a limited number of African Americans to attend out-of-state institutions rather than inegrate its own colleges and universities (IX 5 at 93-95).[6] Finally, in the early 1950's several blacks successfully sued for admission to UMCP. *E.g.*, *McCready v. Byrd*, 195

---

[5]Even after the 1890 Morrill Act required Maryland to designate a land-grant college for African Americans in order to receive federal land-grant aid, it appears that the State failed to allocate funds to the black institution, instead allowing all state funding to flow to UMCP (IX 4 at 136).

[6]The first court challenge to Maryland's *de jure* segregated higher education system came after the State denied Thurgood Marshall admission to its law school, *see* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 45-46 (1993). After graduating from Howard Law School, Marshall won an order directing the admission of Donald Murray to the University of Maryland Law School. *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936).

Md. 131, 73 A.2d 8, *cert. denied*, 340 U.S. 827 (1950); *see also* UX 70 at 154; IX 6.

After the decision in *Brown*, University officials voted in 1954 to remove restrictions on black enrollment (UX 70 at 155), but took few steps in the ensuing two decades to change the racially dual character of the higher education system. Only when threatened with loss of funding by the federal government's Office for Civil Rights ("OCR") in the 1970's and early 1980's did Maryland begin to take steps to dismantle its dual system.[7]

In 1985, Maryland proposed a higher education desegregation plan that OCR accepted. The plan reflected OCR's strong encouragement of using "other-race" financial assistance (aid made available to students who are members of groups that are underrepresented at racially identifiable institutions operated under the dual system) as a desegregation tool. For the period 1985-89, over $7,900,000

---

[7]In 1969, the Office for Civil Rights of the United States Department of Health, Education and Welfare notified Maryland that it was continuing to operate a racially segregated system of higher education in violation of Title VI (UX 71; *see* 43 Fed. Reg. 6658 n.2 (Feb. 15, 1978)). In so doing, OCR noted the racial identifiability of Maryland's colleges: three formerly white state colleges and UMCP had enrollments that were approximately 99% white, while the three formerly black schools and the Princess Anne campus of the University of Maryland had enrollments approximately 92% black (UX 71).

In 1975, the State brought an action against OCR to forestall formal Title VI enforcement proceedings, *Mandel v. HEW*, 411 F. Supp. 542 (D. Md. 1976), *aff'd*, 571 F.2d 1273 (4th Cir.), *cert. denied*, 439 U.S. 862 (1978). That litigation was dismissed in 1985 when OCR accepted a five-year desegregation plan from the State. Stipulation of Dismissal at 2, *Hughes v. United States Dep't of Education*, Civ. No. N-76-01 (D. Md. June 3, 1985). (The responsibilities of HEW's Office for Civil Rights were transferred to the Office for Civil Rights of the U.S. Department of Education following its establishment in 1980, 20 U.S.C. § 3441(a)(3) (1988 & Supp. V 1993); *see also* 20 U.S.C. § 3413 (1988).)

in other-race financial assistance was provided to students at all institutions; $2,387,065 at historically black schools and $5,586,103 at other institutions.[8] Although black enrollment at several historically white colleges, particularly UMCP, increased during the life of the plan, by 1990 more than 60% of black full-time undergraduate students in Maryland public colleges still attended one of the four historically black institutions (UX 43, Table B-8). African-American students made up 11.2% of UMCP's enrollment that year (UX 21).[9]

The Banneker scholarship program

The Banneker Program was originally established by UMCP in 1978 as part of the State of Maryland's efforts to comply with the OCR requirement that it dismantle its segregated system of higher education. In 1980, OCR concluded that the State's efforts were still inadequate and ineffective. The agency specifically directed Maryland's attention to the low enrollment of black students at traditionally white colleges, including UMCP (UX 81, at 9-10). Five years later, OCR explicitly recommended that the State increase the number and amount of need- and merit-based scholarships designated for African Americans enrolled at UMCP (UX 84, attachment at 3).

The Banneker scholarships originally provided $1000 per year for two years to minority students at UMCP. They were subsequently expanded to provide four years'

---

[8]Appendix C to Brief of *Amicus Curiae* United States Department of Education, *Podberesky v. Kirwan*, Civ. No. JFM-90-1685 (D. Md., filed July 27, 1993).

[9]OCR has not yet made a determination whether Maryland's higher education system is in compliance with the requirements of Title VI. The agency has announced that it will apply the standards of this Court's ruling in *United States v. Fordice*, ___ U.S. ___, 112 S. Ct. 2727 (1992), to pending Title VI evaluations of the expired plans of six states, including Maryland. 59 Fed. Reg. 4271-72 (Jan. 31, 1994).

undergraduate support (IX 20, at 231a) and in 1981 to provide full (in-state) tuition (UX 59, Chart 1). In 1988, eligibility for the Banneker program was restricted to African-American students and the amount of aid was increased to provide support for all costs normally associated with matriculation at UMCP. However, in the 1990-91 school year, the cost represented only one per cent of total financial aid available to UMCP students (*Id.*; UX 62; *see also* 838 F. Supp. at 1077, 35a-36a).

At the time plaintiff applied, eligibility for Banneker scholarships was restricted to African-American students who had been admitted to UMCP and who had a minimum high school grade-point average of 3.0 and minimum SAT score of 900.[10] UMCP selected, from among applicants meeting these criteria, those who also demonstrated characteristics that had been found to correlate better than grades and standardized test scores with retention and graduation of black students at UMCP (UX 47 ¶ 17 [affidavit of Banneker Committee chair]; *see also* UX 15 at 4 [study by UMCP professor]; UX 6 at 14-15 [study by Dr. Walter Allen, UCLA, commissioned for this case]).

The selection process brought to UMCP, as Banneker Scholars, black students who have completed their studies and graduated with honors at rates closest to those for white students (UX 43 at 13 [study by Dr. William Trent, University of Illinois]). Recipients of Banneker scholarships do far more than just graduate with honors; they also serve as tutors and mentors to other African-American students at UMCP and frequently participate in the school's recruiting efforts that are directed toward high schools with substantial

---

[10]838 F. Supp. at 1077, 35a-36a. UMCP also awards full-cost, merit-based Francis Scott Key scholarships without any racial restriction. *Id.* at 1095, 83a. However, Mr. Podberesky did not qualify for a Key scholarship for 1990. 764 F. Supp. at 377, 134a.

black student enrollments (UX 6 at 21; UX 9 ¶ 31, UX 12 ¶ 14 [affidavits of Director and Assistant Director of Undergraduate Admissions at UMCP]). A study of African-American students' persistence and graduation from 1974 through 1992 indicated that the Banneker scholarships were an important factor in increasing blacks' enrollment and success at UMCP (UX 43 at 18 [Trent]). As the District Court found (838 F. Supp. at 1094-95, 82a-83a):

> Continuation of the Banneker Program thus serves to enhance UMCP's reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus.

Initial litigation

Respondent's complaint alleged that restriction of Banneker scholarships in 1990 to black students violated, *inter alia*, the Fourteenth Amendment's Equal Protection Clause and Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. Following discovery, the parties (then limited to the respondent, and UMCP and its President) filed cross-motions for summary judgment. On May 15, 1991, the District Court granted summary judgment in favor of the University. It held that while the operation of the Banneker program was subject to the "strict scrutiny" analysis of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the requirements of that analysis were satisfied.

The district court ruled that Maryland had a compelling justification for adopting the Banneker program as a means of remedying its own prior discrimination against African Americans in the operation of its higher education system. The court pointed to OCR's findings that Maryland violated Title VI, to the protracted enforcement proceedings,

and to the fact that the federal enforcement agency had not yet made a determination that the State had met its remedial obligations under Title VI. 764 F. Supp. at 371-73, 122a-125a. The court stated that "there must be continuing effects of past discrimination to justify a race-conscious remedy," *id.* at 374-75, 129a, and that plaintiff offered "some evidence" that by 1989 the State's implementation of its 1985 desegregation plan had been effective at UMCP. Nevertheless, the court found that there was no triable issue as to whether UMCP officials in 1989 had a "strong basis in evidence" for concluding that the effects of their prior discrimination had not yet been eradicated, particularly in light of the fact that OCR had not made a determination to the contrary. *Id.* at 372, 123a [*citing Croson*, 488 U.S. at 500], 375, 130a. It also held the Banneker Program to be "narrowly tailored," as required by *Croson* and other rulings of this Court. *Id.* at 375-76 (130a-133a).

The Court of Appeals reversed, because it determined that the district court "failed to make a [sufficiently] specific finding" that there were continuing effects of the prior discrimination at the time respondent was held ineligible for a Banneker scholarship in 1989. 956 F.2d at 57, 106a. It emphasized the need for a careful review of the facts (*id.*):

> In determining whether a voluntary race-based affirmative action program withstands scrutiny, one cannot simply look at the numbers reflecting enrollment of black students and conclude that the higher educational facilities are desegregated and race-neutral or vice versa. It may very well be, given the complexities of institutions of higher education and the limited record on appeal, that information exists which provides evidence of present effects of past discrimination at UMCP, but no such evidence was brought to our attention nor is it part of the

> record. . . . Should no further evidence be available upon remand, summary judgment for appellant would be appropriate.

The Court of Appeals did not reach the "narrowly tailored" issue, *id.* at 57 n.7, 107a n.7.

Proceedings after remand

When the case returned to the District Court in 1992, the present Petitioners (six African-American UMCP student recipients of Banneker scholarships and two African-American high school students who were potential applicants to UMCP) were permitted to intervene as defendants. The University of Maryland conducted an extensive administrative fact-finding review of the Banneker program in which all parties to this litigation were invited to participate. On April 26, 1993, the University issued a formal *Decision and Report* (139a-220a), accompanied by extensive supporting exhibits, which concluded that *in 1989 and in 1993* continuing effects of the racially discriminatory dual system persisted at UMCP and influenced the enrollment decisions of African-American students (*cf. Fordice*, 112 S. Ct. at 2737).

These materials, along with additional affidavits, declarations and documentary evidence, were presented to the District Court in connection with cross-motions for summary judgment again filed by both sides in the case, following an additional discovery period.[11] On November

---

[11]The defendant parties deposed both of plaintiff's designated expert witnesses, neither of whom indicated familiarity with the facts and circumstances relating to the Maryland higher education system in general, or UMCP in particular. For example, Dr. Carl Cohen admitted that he had "conducted no independent study of . . . the extent to which past discriminatory actions with lingering effects were at any time eliminated as a consequence of the remedial actions taken by the University of Maryland" (IX 46 at 58) and that "I have been very careful

18, 1993, the District Court again granted summary judgment against respondent Podberesky. 838 F. Supp. 1075, 34a. In its opinion, the court first summarized the extensive history of official discrimination against African Americans in Maryland, including lack of access to opportunities for higher education; it then described the State's painfully slow response both to *Brown* and to the federal government's attempts to have the State dismantle its dual system of higher education. *Id.* at 1077-81, 36a-48a. The court thereafter turned to the four specific effects of the prior discrimination that the University had concluded, in its *Decision and Report*, persisted at UMCP: (1) the school's reputation within the black community as an institution at which African-American students were not welcome and would not succeed; (2) continuing underrepresentation of blacks in the student body; (3) persistent low retention and graduation rates of African-American students at UMCP; and (4) a racially hostile campus climate. *Id.* at 1082, 50a.[12] Based upon the affidavits and declarations of University officials, faculty and students, and others, statistical data,

---

in my previous answers to explain that I cannot speak with authority concerning the causal connections between previous events and the present" (*id.* at 124). Dinesh D'Souza testified that he had reviewed only one document prior to preparing his affidavit (IX 47 at 69-72, 78-80). On the basis of this discovery, the defendant parties moved to exclude evidence from plaintiffs' "experts," but the District Court did not rule on the motion and allowed affidavits from both individuals to be submitted with plaintiff's cross-motion for summary judgment.

[12]Defendant-intervenors also argued that the low number of black faculty at UMCP was traceable in part to the long-maintained dual system and exclusion of African-American students from opportunities for study leading to academic careers. The District Court did not address this argument, except to note that the "absence of African-American members of the faculty to serve as mentors" was a "significant contributing factor[]" to low retention rates for African-American students, 838 F. Supp. at 1091-92, 74a-75a.

and scholarly studies conducted at the defendant parties' request, the District Court concluded that "all four of UMCP's findings are supported by strong evidence." 838 F. Supp. at 1083, 52a. Specifically, the trial court determined that

> (a) there was substantial evidentiary justification for UMCP's conclusion in 1989 that the school continued to be viewed, in Maryland's black community, as a racially exclusionary institution based upon the personal experience and exposure of parents and other adults to its long history of segregation, resistance to integration, and prevalent atmosphere of hostility to African Americans on the campus, 838 F. Supp at 1084-87, 54a-62a;
>
> (b) the most appropriate statistical comparisons, taking into account UMCP's highly flexible admissions process,[13] indicated that African Americans continued to enroll as undergraduates at UMCP in numbers significantly below what might

---

[13]Although UMCP considered whether applicants had high school diplomas, had completed a set of specified secondary education course offerings, had taken the SAT or ACT tests (and, if so, the scores they had achieved), and what their high school grade-point average was, each of these criteria was applied with great flexibility; indeed, applicants were admitted without any requirement that they meet any particular standard or level of performance as to any or all of these factors, but rather based upon individual assessment of their likelihood of succeeding in the school's program. (*Decision and Report* at 17, 173a-175a; UX 9 ¶¶ 6-9; IX 36 at 6-7, 17-19, 22-25; UX 108 [Admissions Criteria].) The District Court correctly concluded that "in fact, the University does not have rigid minimum admissions requirements," 838 F. Supp. at 1087, 64a. Nevertheless, the court did not "entirely disregard[]" the criteria but rather held that their existence and impact on the majority of admissions decisions required comparison of African-American enrollment rates with a pool more restricted than simply Maryland high school graduates, *id.* at 1089, 68a-69a.

reasonably be anticipated at Maryland's flagship institution in the absence of its racially exclusionary past and continuing negative reputation, *id.* at 1087-89, 63a-69a;

(c) there was "a strong evidentiary basis for th[e] finding" that black undergraduate students admitted to UMCP are disproportionately less likely than whites with similar credentials to remain enrolled and to graduate, due in part to factors connected with the University's prior discrimination, *id.* at 1091-92, 72a-75a; and

(d) "there is a strong evidentiary basis in the record to support" the finding that on the UMCP campus, a climate of hostility to blacks (inconsistent though it may be with the University's contemporary official policies and pronouncements) exists that in part reflects problems created by UMCP's past exclusion and discriminatory treatment of African Americans, *id.* at 1092-94, 75a-81a.

The District Court also found, as it had initially, that the Banneker Program was "narrowly tailored" to address these continuing effects of prior discrimination because the University's experience with "race-neutral" measures had been unsatisfactory, because the University will reconsider the need for its continuation at least every three years, because the proportion of UMCP financial aid subject to this racial restriction is minute, and because the scholarship program, while it appears to be succeeding (over time) in eliminating the continuing effects of discrimination, operates without impact upon the decision whether or not to admit *any* non-African-American applicant to the school, *id.* at 1095-96, 83a-87a. The court accordingly granted summary judgment in favor of defendants and defendant-intervenors and denied Podberesky's cross-motion.

The ruling below

The Court of Appeals again reversed. It disagreed with the trial court about whether the University was entitled to summary judgment on any issue. Interpreting the District Court's finding about UMCP's reputation in the black community as relating solely to pre-1954 absolute exclusion of undergraduate African-American students from the school, it ruled that *as a matter of law* this effect, even if traceable to the State's prior discrimination, could not justify a race-conscious remedy such as the Banneker Program. 38 F.3d at 154, 10a. The panel also disagreed with the District Court's conclusion that the hostile racial climate at UMCP was traceable to the dual system because "the [evidence] . . . do[es] not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination," which was an insufficient ground for employing a race-conscious remedy, *id.* at 154, 11a.

With respect to the underrepresentation of African Americans in UMCP's student body, and retention and graduation rates, the panel held that summary judgment for defendant parties was improper because plaintiff had presented sufficient evidence to raise triable factual issues on these claims, *id.* at 155-57, 13a-18a.[14] The panel went further, however, holding that plaintiff's cross-motion for summary judgment should have been granted. In its view, there were several reasons the Banneker Program could not be said to be narrowly tailored, even assuming *arguendo* that defendants and defendant-intervenors had established that

---

[14]Despite the District Court's finding, supported by uncontroverted evidence, that there were *no* rigid qualifications for admission to UMCP, see *supra* note 13, the panel ruled that "the district court should have determined what the effective minimum criteria for admission were by determining the lowest GPA and SAT scores achieved by admittees to the University that year," *id.* at 157 n.5, 16a n.5.

underrepresentation of blacks at UMCP and their disproportionate attrition were remnants of the State's past discrimination. *Id.* at 157-58, 18a-19a. First, according to the panel, "[h]igh achievers" -- such as recipients of Banneker scholarships -- "are not the group against which the University discriminated in the past," *id.* at 158, 20a. Second, the Banneker Program is open to non-residents of Maryland, *id.* at 158-59, 20a-21a. Further, the degree of underrepresentation (and, hence, the necessary duration of the program) cannot be sufficiently ascertained because

> the reference pool must factor out, to the extent practicable, all nontrivial, non-race based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity,

id. at 160, 24a. Finally, the panel asserted, notwithstanding the affidavits and declarations of University officials, that the State had not shown that race-neutral alternatives to the Banneker Program had ever been employed in an effort to reduce attrition of African Americans, *id.* at 160-61, 26a-27a.

Rehearing *en banc* was denied on December 30, 1994, three judges dissenting without opinion (30a-33a).

REASONS FOR GRANTING THE WRIT

I

This Case Presents Issues of Extraordinary National Importance

As the preceding description indicates, this case is unlike any of this Court's recent decisions in the area of voluntary affirmative action, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation*

Agency, 480 U.S. 616 (1987);[15] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In each of those cases, the existence of prior discrimination by the governmental agencies involved was either not admitted or not proven, and the issue before this Court concerned the nature of the State's interest and the showing -- short of proving past discrimination -- that would be necessary in order to justify the affirmative consideration of race or gender.[16]

Here, in contrast, Maryland's operation of separate institutions of higher education for blacks and whites, and its long delay after 1954 in taking any meaningful action toward dismantling that system, is undisputed. The genesis of the Banneker scholarship program in the course of Title VI administrative proceedings involving the desegregation of Maryland's university system is also undisputed. Thus the remedial purpose motivating the original adoption of the Banneker Program is unquestioned. The Court has not yet addressed the contours of permissible affirmative action in

---

[15]Of course, *Johnson* involved only a Title VII claim, and not the Equal Protection Clause, 480 U.S. at 620 n.2, and the Court's opinion there applied a standard of justification for affirmative action that is less rigorous than that applicable in the constitutional context, *see id.* at 632-33 ("manifest imbalance" need not rise to level of "*prima facie*" case). However, the analysis is very similar to that in constitutional challenges, and Justice O'Connor, concurring in the judgment, specifically applied that analysis based upon her conclusion that the "*prima facie*" standard was satisfied on the facts of *Johnson*, 480 U.S. at 656.

[16]The instant case also differs from decisions involving the scope of the federal courts' equitable authority to impose race-conscious remedies, *e.g.*, *United States v. Paradise*, 480 U.S. 149 (1987); *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 v. EEOC*, 478 U.S. 421 (1986); *Firefighters v. Stotts*, 467 U.S. 561 (1984). *Cf. Local No. 93*, 478 U.S. at 526 (parties may consent to broader relief than court is empowered to order).

such circumstances.[17] It is imperative that it do so in this case, for lacking such guidance, the panel below mechanically applied the strict scrutiny test of *Croson*, a case in which no remedial purpose could be discerned, to diametrically contrary conditions.

There Is A Compelling Need for Race-Conscious Remedial Action at UMCP

Podberesky (and the panel below) focused their criticism upon the University's determination that effects of the dual system endured at UMCP and justified continued operation of the Banneker Program. As developed in the *Decision and Report* issued by the University in 1993, and in the evidence put before the District Court, salient characteristics of UMCP's historic mission and operation as a whites-only school have continued to affect the enrollment and retention of African Americans at the institution and to contribute to its racial identifiability, see *supra* pp. 6, 12-13; *cf. Fordice*, 112 S. Ct. at 2736-38 (policies and practices conceived in the era of the dual system may restrict or influence students' current institutional choices). For example, there was abundant evidence that UMCP continued to be burdened by its reputation as a once-totally segregated institution that only grudgingly admitted black students and which failed to provide them with the same kind of academic and other support systems available to whites,[18] and that African-American students still suffered

---

[17]Seventeen southern and border states operated *de jure* segregated systems of higher education, faced federal pressure to dismantle those systems, and continue to struggle to eliminate the harmful remnants of their existence. *See, e.g.*, Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29 (1987).

[18]The panel's view that UMCP's reputation in the African-American community stems solely from pre-1954 practices, 38 F.3d at 154, 10a,

much higher attrition rates than whites. The University designed the Banneker Program not merely to increase black enrollment -- as a simple admissions preference might have done -- but to address these underlying problems in a positive manner and *change* its reputation in the African-American community. Indeed, the University's Banneker Program minimizes its impact on non-black third parties because it is applicable only *after* admissions decisions are made and because it represents a very small proportion of total financial aid available to UMCP students.

Such carefully tailored voluntary actions by State officials to overcome the legacy of their constitutional violations deserve to be encouraged if the nation as a whole is ever to overcome its sorry history of discrimination. "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

The panel below acknowledged that patterns of enrollment by race that originated prior to *Brown* and

---

cannot be squared with the evidence. For example, the District Court quoted from the affidavit of a UMCP official (UX 10 ¶ 8) recounting conversations with teachers, principals and counsellors in Baltimore in which they reported not only their own negative experiences at College Park, but also "their former students['], whose feedback over the years indicated that life at UMCP had not significantly changed over time," 838 F. Supp. at 1085, 57a-58a. Similarly, a series of focus group interviews with randomly selected black parents indicated that contemporary racial incidents and the hostile climate at UMCP were as important as historical events in shaping the school's negative reputation in the African-American community (UX 7 at 8-14, 20-27 [report of Dr. Joe R. Feagin]), which led many parents to advise black high school students not to apply to UMCP (*id.* at 31-34).

continued into the 1970's persist in Maryland's higher education system, see *infra* note 23, suggesting that institutional choice in the State is not yet "wholly voluntary and unfettered," *Fordice*, 112 S. Ct. at 2737, *citing Bazemore v. Friday*, 478 U.S. 385, 407 (1986) (White, J., concurring). But the panel deprived the State of authority to address lingering influences upon choice. It held the University was powerless to undertake the Banneker Program for the purpose of extirpating its negative reputation within the African-American community and it trivialized the State's concern. Even if UMCP's negative reputation was attributable to prior segregation, the panel said, it was based upon "mere knowledge of historical fact [and] is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this one." 38 F.3d at 154, 10a.

But this Court recognized explicitly in *Fordice* that a state that formerly operated a dual system may "need . . . [to] take additional steps to ameliorate [racial] identifiability" that persists at its higher education institutions. 112 S. Ct. at 2736 n.4. As lower courts in higher education desegregation cases have perceived, if the remedy is to be effective such steps must include race-conscious measures. *E.g.*, Memorandum Opinion and Remedial Decree, *Ayers v. Fordice*, No. 4:75CV009-B-0 (N.D. Miss. March 7, 1995), at 167 n.365. *See id.* at 105-06, 108-12, 118 (approvingly noting, in discussion of steps taken to increase diversity and improve the racial climate,[19] the provision of special financial aid

---

[19]The *Ayers* court said: "Ghosts of the past, which potentially have segregative effects by stimulating a climate nonconducive to diversity on the historically white campuses, include the lack of minority faculty as well as their absence in significant numbers in the top positions within Mississippi's academia . . . to some extent . . . a product of the *de jure* segregation," *Ayers*, slip op. at 117-18. *Cf. supra* note 12.

and scholarship opportunities for blacks at historically white institutions in Mississippi), 178-79 ¶¶ 6, 9 (directing state to establish $5 million endowments for purposes of increasing racial diversity at Jackson State University and Alcorn State University, including by establishing other-race scholarship programs); Settlement Agreement, appended to Minute Entry, *United States v. Louisiana*, Civ. No. 80-3300 (E.D. La. Nov. 14, 1994), at 19 ¶ 21 ("significant financial assistance" to be provided for African-American law students at LSU Law Center), 21 ¶ 22.3 ($900,000 per year to be provided for scholarships for other-race doctoral candidates at predominantly white institutions), 22 ¶ 22.f ($700,000 per year for other-race graduate scholarships to be provided at Southern University campuses); *Knight v. State of Alabama*, 787 F. Supp. 1030, 1292-97 (N.D. Ala. 1991) (favorably describing other-race financial aid offered to promote increased African-American enrollment in traditionally white Alabama institutions of higher education), *aff'd in part, rev'd in part, vacated in part and remanded on other grounds*, 14 F.3d 1534 (11th Cir. 1994); *Geier v. Alexander*, 593 F. Supp. 1263, 1270 (M.D. Tenn. 1984) (approving pre-professional program and scholarships for black students as part of settlement of issues in higher education desegregation suit between private plaintiffs and state, and binding intervenor United States to terms), *aff'd*, 801 F.2d 799 (6th Cir. 1986).[20]

---

[20]The U.S. Department of Education and its predecessor agency have approved and encouraged the use of other-race scholarship programs in state desegregation efforts pursuant to Title VI, 42 U.S.C. § 2000d (1994). *See Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Higher Education*, 43 Fed. Reg. 6658, 6662 (Feb. 15, 1978), ¶ II.H.; UX 84, attachment at 3 (1985 OCR recommendation that Maryland increase number and amount of other-race scholarships); 59 Fed. Reg. 8756 (February 23, 1994).

The Approach of the Court Below Allows Insufficient Room for Necessary Race-Conscious Remedial Steps

The decision below subjects Maryland's use, in 1989, of these same tools not just to "strict scrutiny," but rather to a "presumption" of unlawfulness, *see* 38 F.3d at 152, 6a. In spite of the undisputed background of segregation and official discrimination at UMCP and in spite of the unquestioned remedial purpose that led to the creation of the Banneker Program, the court below treated the State of Maryland as if it were the City of Richmond in the *Croson* case, lacking any documented history of past discrimination in the domain of its affirmative action plan. Viewed in that light, it is hardly surprising that the Banneker Program -- once uprooted from the legacy of segregation that spurred its creation -- was found not "narrowly tailored." Applying a presumption of illegality even in cases of proven prior discrimination leaves virtually no room at all for remedial affirmative action, no matter how carefully structured. It amounts to "a rule of automatic invalidity for racial preferences in almost every case," *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment), and it presents states that formerly operated racially dual systems with a severe dilemma -- they can do nothing and wait to be sued by African-American citizens or the federal government, or they can attempt to address their problems frontally and creatively and risk being sued by whites, who already enjoy disproportionate access to the benefits of public higher education.

The effect of applying a presumption of unlawfulness even to a remedial affirmative action plan adopted after an unambiguous finding of past discrimination is illustrated by the panel's cramped and error-laden analysis of features of the Banneker Program that it found to be indicators that the program was not "narrowly tailored." For example, the panel ruled that "[i]f the purpose of the [Banneker] program

was to draw only high-achieving African-American students to [UMCP], it could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past." 38 F.3d at 158, 20a. Not only does this pronouncement lack any support whatsoever in the record of this litigation -- indeed, the record contradicts it -- it is flatly belied by a history of pre-1954 educational segregation in the southern and border states of this nation that is so well established that it is subject to judicial notice. *All* African-Americans, notwithstanding their academic potential or their place of residence, were barred from Maryland's flagship institution and its professional schools for more than a century. Of course, the tragedy of this history is that we can never know how many more Thurgood Marshalls might have emerged from Maryland to enrich the State's citizenry and the history of our country if there had been equal educational opportunity even for "high achievers" who were black.

Moreover, the purpose of the Banneker Program is not solely to benefit high-achieving African Americans. Banneker Scholars serve as positive role models and mentors, helping to break down racially hostile attitudes at UMCP and to stimulate increased black enrollment, see *supra* p. 7-8. The panel dismissed this remedial purpose based upon its reading of *Wygant*, 38 F.3d at 159, 21a-22a. But in *Wygant* the "role model theory" was advanced by a school board which *denied* any past discrimination as a justification for racial preferences in making layoffs. Here, the underlying remedial purpose is indisputable, and UMCP seeks merely to take advantage of the "role model" phenomenon to assist in remedying the lingering effects of prior discrimination in admitting and treating African Americans at the school. Nothing in *Wygant* rules out otherwise permissible affirmative action merely because it is

designed to take advantage of "role modeling" opportunities to combat prejudice and stereotyping.

Finally, applying a presumption of invalidity despite the University's remedial purpose led the panel to question UMCP's flexible admissions process in assessing whether there was still underrepresentation of African Americans at the school that could be ameliorated by the Banneker Program. Although acknowledging that there are no minimum criteria for admission, 38 F.3d at 157 n.5, 16a n.5, the panel held that "the district court should have determined what the *effective minimum criteria for admission were* by determining the lowest GPA and SAT scores achieved by admittees to the University that year," *id.* (emphasis added), and then calculated the pool of potential African-American applicants who met those "effective minimum criteria." This approach ignores the fact that the lowest GPA and SAT scores of a particular entering freshman class are an artifact of the overall characteristics of the applicant pool in that year, and not a reflection of the "unspoken" but "effective" real minimum criteria for admission, and the fact that UMCP officials may at any time accept another candidate with a lower average or score than anyone already granted admission if they conclude that the candidate has the ability, overall, to succeed at the school.[21]

If the ruling below is permitted to stand, neither college and university staffs, states, federal courts nor the United States Department of Education will have any way of knowing whether other-race scholarships such as those awarded under the Banneker program at UMCP are to be

---

[21]Even if the panel were correct, that could not support its holding that Podberesky was entitled to judgment as a matter of law. Underrepresentation was only one of the continuing effects of past discrimination identified by the District Court to which the Banneker Program was addressed.

viewed as constitutional remedies or constitutional violations, even in states with long histories of operating racially dual systems of higher education. The decision of the Fourth Circuit in this case, therefore, presents questions of overwhelming national importance that demand resolution by this Court. The Court should issue the writ for this purpose.

II

The Decision Below Rests Upon A Wholly Erroneous View of Statistical Proof in Discrimination Cases that Is Contrary to the Explicit Teaching of this Court in *Bazemore v. Friday*, 478 U.S. 385 (1986), a Ruling in Which This Court Reversed the Same Court of Appeals for the Same Error

In *Bazemore v. Friday*, 751 F.2d 662, 671-72 (4th Cir. 1984), a panel of the Fourth Circuit reviewed the district court's judgment in a suit charging discrimination in compensation against African-American employees of the North Carolina Agricultural Extension Service. The plaintiffs' expert witness had prepared regression analyses which, he testified, indicated that race was a factor accounting for then-current salary disparities between white and black county agents. The defendants' expert witness also prepared regression analyses using the same variables and interpreted the results differently from the plaintiffs' witness. The Court of Appeals affirmed the district court's decision to reject the testimony of plaintiffs' expert about the multiple regression findings in its entirety "because the plaintiffs' expert had not included a number of variable factors the court considered relevant," *id.* at 672.

This Court reversed, *Bazemore v. Friday*, 478 U.S. 385, 387, 400-01 (1986). It held that the inclusion or non-inclusion from a statistical regression equation of additional

factors which might have explanatory value goes only to the probative weight of the evidence, but that it was error to exclude such evidence from consideration entirely because the fact-finder hypothesized that there might be alternative justifications for the observed disparities. The Court suggested that defendants in such cases should not merely criticize the plaintiffs' analyses but should come forward with their own regression tables to rebut whatever showing is made by the plaintiffs.

The panel below made the same error as in the earlier case. The parties to this lawsuit offered different interpretations of statistical data in several categories as appropriate indicators of the pool of qualified potential applicants to UMCP, in light of the fact that the University did not have rigid eligibility criteria (see *supra* note 13). The district court carefully reviewed the evidence presented by the parties and their contentions, ultimately rejecting some arguments made by both sides but determining that at least as late as 1991-92, black students were underrepresented at UMCP in comparison to appropriate "pool" measures. *See* 838 F. Supp. at 1087-89, 63a-69a. The court below, however, held that the district court erred by not including in its analysis a number of other variables that had not been quantified in any evidentiary presentation by respondent but which the panel thought might have explanatory power. 38 F.3d at 159-60, 21a-25a. "[T]he reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity. This the district court simply has not done." *Id.* at 160, 24a.[22]

---

[22]Compare the language in *Bazemore*, 751 F.2d at 672: "An appropriate regression analysis of salary should therefore include all measurable variables thought to have an effect on salary level."

The panel thus made the same error as in *Bazemore*;[23] this Court should issue the writ to correct it.

III

Since the Court Below Concluded that There Were Genuine Disputes about Facts Material to the Cross-Motions for Summary Judgment, It Acted Contrary to FED. R. CIV. P. 56(c) and the Decisions of this Court in Directing the Trial Judge to Enter Summary Judgment for the Plaintiff on Remand

The responsibility of the court below, in passing upon the parties' appeals from the District Court's disposition of

---

[23]In this portion of the opinion the panel also made a different and significant error. It held that the reference pool of potential African-American applicants to UMCP should have been reduced to reflect "that percentage of otherwise eligible African-American high school graduates who . . . voluntarily limited their applications to Maryland's predominantly African-American institutions," *id.* at 159-60, 23a (footnote omitted), adding that it

> infer[red] that significant numbers of UMCP-eligible Maryland African-Americans do choose to go to the [historically] predominantly African-American Maryland schools, such as Coppin State, Bowie State, and UM Eastern Shore, whether their reasons are economic, academic, geographic, or cultural, because the percentages of African-Americans in the student bodies at those schools are so high,"

id. at 159-60 & n.13, 23a & n.13. Since one of the underlying issues in these cases is whether currently existing racial patterns of enrollment decisions are influenced by policies and practices traceable to the prior dual system, *see Fordice*, 112 S. Ct. at 2737, the panel's approach to this question would have the effect of excluding highly probative evidence from the statistical analysis. In short, the panel would preclude any finding of continuing underrepresentation of blacks at UMCP so long as their "college attendance [at the State's historically black institutions] is by choice and not by assignment" -- the very position rejected by this Court in *Fordice*, *see* 112 S. Ct. at 2236.

the cross-motions for summary judgment, was "to assess the record under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure," *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-84 (1990).

> Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

Id. at 884 (emphasis added). The panel applied this standard when it determined that the District Court erred in granting summary judgment for the defendant parties because, "[t]aking the facts [proffered] in the light most favorable to Podberesky, the non-moving party, . . . [there were] factual disputes in this case [that] are not inconsequential and could have been resolved only at trial." 38 F.3d at 156, 157, 14a, 18a. However, the panel completely ignored these asserted factual controversies when it directed the District Court to enter summary judgment for Podberesky on remand. This fundamental error warrants review and correction by this Court to assure that the summary judgment process in the federal courts functions properly.[24]

In an early section (*II*) of its opinion, the panel reviewed the four present effects of past discrimination identified by the District Court. Two, it held, were insufficient as a matter of law to justify continued race-conscious action. See *supra* p. 14.[25] But as to the

---

[24]The Court has demonstrated its concern for these issues in recent years. *See, e.g., Lujan*; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

[25]Neither of these points, we believe, warranted summary judgment for Podberesky. In brief, the panel viewed the availability of Banneker

remaining "two effects that rely on statistical data," the panel said, the "district court erred in its analysis of the under-representation evidence and the attrition evidence for a fundamental reason . . . [a] district court may not resolve conflicts in the evidence on summary judgment motions . . . [as it did] here." 38 F.3d at 155, 13a. When it turned to the denial of plaintiff's cross-motion for summary judgment, the panel focused on the same issues -- underrepresentation and attrition. *Id.* at 157-58, 18a-19a. In this part of the opinion, however (and despite the panel's apparent disclaimer[26]), the court simply ignored the implication of its earlier recognition that there were factual disputes that could be resolved only at trial: *there was enough evidence introduced in support of the positions of the defendant parties to create triable issues and to prevent summary disposition.*[27]

---

scholarships to non-residents and to high-achieving students as being divorced from properly remedial purposes; but, as we have previously pointed out, UMCP excluded *all* African-Americans, resident and non-resident, high-achieving and not-so-high-achieving, for many years.

[26]At the beginning of its discussion about the propriety of denying Podberesky's cross-motion for summary judgment, the panel said, "[e]ven if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination, we could not uphold the Banneker Program [because i]t is not narrowly tailored . . . ," 38 F.3d at 157-58, 18a-19a (footnote omitted). But in the balance of its discussion, the panel not only failed to make this assumption but instead sharply criticized the District Court's assessment of the evidence introduced by the parties on these questions, *see id.* at 159-61, 19a-27a, and commented that "[i]t is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of discrimination when the proof of present effects is so weak," *id.* at 158, 19a.

[27]The panel began this last section of its opinion with the comment that "[i]n our first opinion in this case, we required that should no further evidence be available upon remand, summary judgment for Podberesky should be granted," *id.* at 161, 28a. Extensive additional evidence about

Instead, the panel ignored that factual record; it characterized the State's position on underrepresentation as "rest[ing] on . . . unsupported assumption[s]," *id.* at 160, 25a and it opined, contrary to the declarations and affidavits of both Maryland officials and numerous Presidents and Chancellors of colleges and universities in the United States, that "[t]he causes of the low retention rates submitted both by Podberesky and the University and found by the district court have little, if anything, to do with the Banneker Program," *id.* at 161, 27a.

The standards of FED. R. CIV. P. 56(c), like other provisions of the Federal Rules, apply equally to plaintiffs and defendants, *see, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) (Rule 52); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (same). The court below failed to follow this bedrock principle in deciding this case, and its error merits correction by this Court.[28]

---

racial discrimination in Maryland's higher education system and its continuing effects was put before the District Court upon that remand, including, as indicated in the text, sufficient evidence to warrant summary judgment for the defendant parties, or at a minimum a trial, rather than the grant of summary judgment. Nevertheless, the panel suggested that respondent was entitled to summary judgment in *his* favor pursuant to the earlier remand instructions. The panel nowhere explained this contradiction.

[28]Indeed, this error is so clear and unambiguous that the Court may wish to reverse summarily on this ground and remand the case to the District Court with instructions to conduct a trial.

Conclusion

For the foregoing reasons, petitioners Monica Greene, *et al.*, respectfully pray that the Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.[29]

Respectfully submitted,

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

*JANELL M. BYRD
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Petitioners

---

[29]Greene Petitioners note that the second Question Presented in the separate Petition of William E. Kirwan, *et al.* was presented to, but not decided by, either court below. However, the judgment below implicitly decides it adversely to the State of Maryland, in directing the entry of summary judgment in favor of plaintiff Podberesky. That question will be moot if this Court reverses the Fourth Circuit on the other grounds urged in both petitions. If the Court does not, it may wish to vacate and remand so that the question may be explicitly considered by the District Court and the Court of Appeals.

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

Nos. 94-1620, 94-1621

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

WILLIAM KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

SAMUEL PODBERESKY
253 Milthorn Court
Riva, MD 21140
(410) 269-1635

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: May 1, 1995

QUESTIONS PRESENTED

I. Whether a state university which formerly excluded blacks but which at least 40 years ago eliminated all policies and practices -- traceable to the segregative era -- which had segregative effects, is nonetheless permitted under the Fourteenth Amendment to provide race-exclusive benefits in order to alter certain blacks' perceptions of the university and alter some black students' voluntary enrollment patterns.

II. Whether a publicly-funded academic scholarship program that is open to all blacks without regard to citizenship, residence, or financial need but that excludes all nonblacks is "narrowly tailored" to eliminating continuing effects of pre-1954 racial discrimination against blacks.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

REASONS FOR DENYING THE PETITION 11

I. THE DECISION BELOW WAS MANDATED BY THIS COURT'S *FORDICE* DECISION 13

II. THE DECISION BELOW WAS FULLY CONSISTENT WITH CASE LAW REGARDING "NARROWLY TAILORED" REMEDIES 18

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY RECENT APPELLATE DECISIONS 24

IV. PETITIONERS HAVE NOT PROPERLY RAISED THE "DIVERSITY" ISSUE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Ayers v. Fordice, No. 4:75CV009-B-O, ___ F. Supp. ___ (N.D. Miss. Mar. 7, 1995) . . . 18

Bazemore v. Friday, 478 U.S. 385 (1986) 16

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) 17, 25-26

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 25-26

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 13, 18, 21, 26

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992) 30

Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 27

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) 26

Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 15

Guardians Ass'n v. Civil Service Comm'n of City of New York, 463 U.S. 582 (1983) 28

Hammon v. Barry, 813 F.2d 412 (D.C. Cir. 1987), *reh. denied*, 826 F.2d 73 (D.C. Cir.), *cert. denied*, 486 U.S. 1036 (1988) 17

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) 19

Hirabayahi v. United States, 320 U.S. 81 (1943) 12

In re Birmingham Reverse Discrimination Litigation, 20 F.3d 525 (11th Cir. 1994), *cert. denied sub nom., Martin v. Wilks*, ___ U.S. ___, 63 U.S.L.W. 3754 (April 17, 1995) 28

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 15

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 22

Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) . . 25-26

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984) 27

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 12, 20, 29

Shaw v. Reno, 113 S. Ct. 2816 (1993) 12, 21

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 17, 25

United States v. Fordice, 112 S. Ct. 2727 (1992) . . . . . *passim*

United States v. Paradise, 480 U.S. 148 (1987) 18

Valentine v. Smith, 654 F.2d 503 (8th Cir.) *cert. denied*, 454 U.S. 1124 (1981) 27

Weinberger v. Salfi,
422 U.S. 749 (1975) 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 12, 13, 18

Constitutional Provisions and Statutes:

U.S. Const., 14th amend.
(Equal Protection Clause) 4, 10, 28

42 U.S.C. § 1981 . . . . . 4, 28

42 U.S.C. § 1983 4

Civil Rights Act of 1964, Title VI,
42 U.S.C. § 2000d *et seq.* 4, 8, 10, 27-28

Miscellaneous:

"Banneker's future affected by many,"
The Diamondback (April 13, 1995) 3, 21, 30

59 Fed. Reg. 8956 (Feb. 23, 1994) 28

S. Ct. R. 10.1 28

Fed. R. Civ. P. 56 29

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Nos. 94-1620, 94-1621

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 38 F.3d 147. The order of the Court of Appeals denying Petitioners' petitions for rehearing (Pet. App. 30a-33a) is reported at 46 F.3d 147. The opinion and order of the district court (Pet. App. 34a-95a) are reported at 838 F.Sup. 1075.

The case was argued before both the Court of Appeals and the district court on a prior occasion. The first

opinion of the Court of Appeals (Pet. App. 96a-108a) is reported at 956 F.2d 52. The first memorandum and order of the district court (Pet. App. 109a-138a) are reported at 764 F. Supp. 364.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1994. On November 10, 1995, Petitioners filed petitions for rehearing with suggestions for rehearing in banc. Those petitions were denied by an order of the Court of Appeals entered December 30, 1994. The petitions for a writ of certiorari were filed on March 29 and 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is before the Court for a determination of the legality of the Banneker Program, a non-need-based academic scholarship program operated and funded by the University of Maryland at College Park (UMCP) that sets aside a number of scholarships solely for blacks. Banneker Scholarship recipients receive a four-year, all-expenses-paid grant. Respondent Daniel Podberesky was denied an opportunity to compete for a Banneker Scholarship because he is not black.

Mr. Podberesky was accepted by UMCP in the fall of 1989 and invited to participate in UMCP's selective honors program. He enrolled in the fall of 1990 and graduated Phi Beta Kappa in May 1994 with a 3.8 grade point average ("GPA") and a degree in biochemistry. He is now completing his first year in medical school.

As an applicant to UMCP, Mr. Podberesky's academic credentials were outstanding. He scored 1340 (out of a possible 1600) on the November 1989 Scholastic Aptitude Test (SAT), the standardized test of verbal and mathematical skills taken by virtually all UMCP applicants. As calculated by his high school, his GPA through

his junior year in high school exceeded 4.00 on a scale of 0-4. Mr. Podberesky's active participation in extracurricular and community service programs while in high school demonstrated his tremendous leadership potential.

In conjunction with his application for admission to UMCP in the fall of 1989, Mr. Podberesky asked to be considered for an academic scholarship. UMCP has maintained two merit-based, academic scholarship programs that are the focus of this case: the Banneker Program and the Francis Scott Key Scholars Program (the "Key Program").[1] The Banneker Program provides benefits to each scholarship winner worth about $35,000 for in-state students (and considerably more for those from out of state), covering full financial support for four years of college, including tuition, room, board, book expenses, fees, and other benefits. The Key Program provides virtually identical benefits. Most recently, roughly 30 Banneker Scholarships and 30 Key Scholarships have been awarded each year.[2]

Scholarships are awarded under the Banneker and Key programs to academically talented students without regard to their parents' financial resources. Incoming UMCP students receive consideration for such scholarships if and only if their SAT scores and high school GPAs meet cer-

---

[1] Funds for the Key and Banneker Programs have come from the same pool of state and tuition money and have been split on a 50-50 basis. Court of Appeals Joint Appendix ("J.A.") 566-67. State desegregation funds play a very small role in Banneker funding.

[2] Following the Court of Appeals's denial of the petitions for rehearing, UMCP announced that, pending completion of appeals in this case, it was combining the two programs into a new academic scholarship program to be known as the Banneker-Key Program. About 60 scholarships are to be awarded annually under this new program, with race to be taken into account as one factor in the award of scholarships. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). UMCP stated that it would reestablish the Banneker Program should it ultimately prevail in this litigation. *Id.*

tain pre-established minimums; these minimum requirements are set high enough so that only a small group of students meet the minimums and receive further consideration for scholarship awards. Mr. Podberesky's SAT score and high school GPA placed him just below the threshold for further consideration under the Key Program. Pet. App. 99a n.2.

On the other hand, his academic credentials far exceeded those required for further consideration under the Banneker Program; the minimum requirements for further consideration under the Banneker Program were a 900 SAT score and a 3.0 GPA. Pet. App. 99a. Nonetheless, Mr. Podberesky was not considered for a Banneker Scholarship because he failed to meet an additional requirement applicable to the Banneker Program (but not the Key Program): Banneker Scholarships are awarded only to blacks, and Mr. Podberesky is Hispanic. Mr. Podberesky protested to UMCP officials that the setting aside of financial aid funds for members of only one race violated his constitutional rights, but he failed in his efforts to receive further consideration for any of UMCP's merit-based scholarships.

Proceedings Below. Mr. Podberesky filed suit in federal district court in Baltimore against UMCP and its President, William E. Kirwan (the "Kirwan Petitioners"), on June 22, 1990. The complaint alleged that by refusing to consider Mr. Podberesky for a Banneker Scholarship because of his race, Petitioners violated 42 U.S.C. § 1983 (by denying him his Fourteenth Amendment rights to due process and equal protection under the law); the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Mr. Podberesky requested, *inter alia*, that UMCP be enjoined from continuing to operate the Banneker Program in a racially discriminatory manner, and that it be ordered to fully consider him for a Banneker Scholarship without regard to his race.

The parties filed cross motions for summary judgment in January and February, 1991. Petitioners' motion raised only one argument in defense of their racially exclusionary financial aid policy: the need to eliminate the alleged vestiges of Maryland's former dual education system. The motion did not defend the policy based on an alleged compelling need to establish a racially diverse student body.

In an order dated May 15, 1991, the district court granted Petitioners' motion for summary judgment and denied Mr. Podberesky's cross motion. Pet. App. 138a. The court stated that the Banneker Program should be evaluated under a "strict scrutiny" standard, thereby requiring UMCP to demonstrate a "compelling interest" in the program in order to justify its continuation. Pet. App. 121a-122a. The court then held that the program could withstand "strict scrutiny" analysis; it held that Petitioners had a compelling interest in continuing the Banneker Program as a remedial measure necessary to eliminate vestiges of Maryland's former dual education system. Pet. App. 130a. Without directly addressing what "present effects" of past discrimination continued to exist at UMCP, the court said, "[T]he effects of longstanding discrimination are pervasive, and there is ample evidence in the record before me to support the view of UMCP officials that it is premature to find that there are no present effects of past discrimination at the university." *Id.* The district court went on to hold that the Banneker Program was sufficiently "narrowly tailored" to eliminate the vestiges of Maryland's former dual education system. Pet. App. 130a-133a.

Mr. Podberesky appealed both from the grant of Petitioners' summary judgment motion and from the denial of his own summary judgment motion. In an Opinion dated January 31, 1992, the Court of Appeals reversed the May 15, 1991 Order and remanded the case to the district court. Pet. App. 96a-108a.

The Court of Appeals noted that all parties recognized that UMCP had a history of racial discrimination against

blacks but that the discrimination had ended years before Mr. Podberesky sought a Banneker Scholarship in 1990. The court held that a state attempting to justify a racial preference program on remedial grounds must do much more than present evidence of past discrimination against the currently-favored group, particularly when the past discrimination ended other than in the immediate past:

> [I]n order to justity a race-based remedy in a case where identifiable discrimination occurred a number of years in the past, a finding of such discrimination is not sufficient. There must be some present effect of this past discrimination that the program is designed to redress.

Pet. App. 106a.

The Court of Appeals held that the district court erred in granting summary judgment for Petitioners in the absence of an explicit finding of such present effects and added that "no such evidence of present effects was brought to our attention *nor is it part of the record.*" Pet. App. 107a (emphasis added). The Court of Appeals directed the district court to make:

> [A] determination as to the present effects of past discrimination at UMCP. Should no further evidence be available upon remand, summary judgment for [Mr. Podberesky] would be appropriate.

Pet. App. 108a.

On remand, the district court denied Mr. Podberesky's request for an immediate hearing on his pending summary judgment motion. Instead, it granted Petitioners' request for a lengthy delay in proceedings to permit them an

opportunity to investigate present effects of past discrimination at UMCP.[3]

By order dated November 18, 1993 (as amended November 22, 1993), the district court granted Petitioners' motions for summary judgment and denied Mr. Podberesky's renewed motion for summary judgment. Pet. App. 95a. The district court found *as a matter of law* that there was "strong evidence" to support Petitioners' contention there exist present effects of UMCP's past racial discrimination in at least four areas: (1) UMCP's allegedly poor reputation among Maryland blacks; (2) alleged "underrepresentation" of blacks in the UMCP student body; (3) lower retention rates for blacks than for nonblacks; and (4) "perceptions of a college campus that is hostile to African-Americans." Pet. App. 52a. The district court further found *as a matter of law* that the Banneker Program was "narrowly tailored" to eliminating those alleged present effects of UMCP's past racial discrimination. Pet. App. 81a-88a.[4]

---

[3] In July 1992, the district court also granted a motion to intervene filed by a group of UMCP students then receiving Banneker Scholarships and a group of black Maryland high school students who hoped to receive Banneker Scholarships in the future (the "Greene Petitioners").

[4] Given the case's posture at the time the district court issued its decision (cross-motions for summary judgment), the district court erred -- as the Court of Appeals noted (Pet. App. 18a) -- by resolving disputed factual issues and entering lengthy factual findings that essentially mirrored Petitioners' view of the case. In their Statement of the Case, the Kirwan Petitioners cite repeatedly to the "findings" of the district court and suggest that those "findings" are synonymous with the record evidence. That suggestion, of course, is incorrect as a matter of law.

Indeed, many of the district court "findings" upon which Petitioners rely have no evidentiary basis whatsoever. Space does not permit Mr. Podberesky to point out all the unfounded claims included in Petitioners' Statements of the Case, but a few merit mention. In particular, the district court's and Petitioners' accounts of federal

(continued...)

Mr. Podberesky appealed to the Court of Appeals from the denial of his own motion for summary judgment and the grant of summary judgment to Petitioners. In an Opinion dated October 27, 1994, the Court of Appeals vacated the district court's judgment and remanded with instructions that summary judgment be entered for Mr. Podberesky. Pet. App. 1a-29a.

The Court of Appeals held that the district court erred in granting summary judgment to Petitioners, because Mr. Podberesky had submitted considerable evidence that no

---

[4] (...continued)
government involvement in Maryland desegregation efforts are wildly distorted: (1) the Office for Civil Rights (OCR) of the U.S. Department of Health, Education & Welfare *never* issued any formal findings that Maryland's higher education system was not in compliance with Title VI; (2) the 1985-89 higher education desegregation plan submitted by Maryland to OCR (Exhibit 8 to Respondent's 1991 summary judgment motion) made no reference (either direct or indirect) to the Banneker Program (either to the modest program that was open to other racial minorities in 1985 or to the vastly expanded, blacks-only version of the program adopted in 1988), and thus OCR's acceptance of that plan cannot be construed as OCR endorsement of the Program; (3) the 1985-89 plan is irrelevant in any event, because it was no longer in effect during the years at issue in this lawsuit; and (4) while OCR (in connection with its Title VI enforcement responsibilities over all U.S. colleges and universities) is currently reviewing UMCP's compliance with Title VI, Petitioners are off base in suggesting (Kirwan Pet. at 11) that Maryland will not have "achieved [Title VI] compliance" until the review is complete.

Petitioners have also omitted numerous relevant statistics regarding integration at UMCP, including: (1) UMCP's black enrollment rate is the second highest among major state universities and has been steadily increasing for 25 years (Pet. App. 11a-12a), and it consistently ranks among the top three historically white universities in terms of the number of African Americans graduating each year (J.A. 820, 710, 973); (2) the differential between white and black graduation rates at UMCP is significantly smaller than the differential at NCAA Division I schools taken as a group (Addendum to Respondent's March 24, 1994 Fourth Circuit Reply Brief); and (3) UMCP administrators vigorously deny that the school has discriminated against blacks in any way during the past two decades (J.A. 2848-9, 2854-5), and the Greene Petitioners do not allege otherwise.

vestiges of UMCP's past racial discrimination remained on the UMCP campus. Pet. App. 18a. The Court of Appeals further held that two of the four alleged vestiges of past discrimination cited by the district court (UMCP's allegedly poor reputation among Maryland blacks and alleged non-institutional racial hostility on the UMCP campus) are insufficient to justify race-exclusive remedial action. Pet. App. 10a. The court stated:

> [A]ny poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students [beginning in 1954]. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.

Id.[5]

Finally, with respect to the other two vestiges alleged by Petitioners (alleged "underrepresentation" of blacks on the UMCP campus, and lower retention rate for blacks than for whites), the Court of Appeals held as a matter of law that the Banneker Program was not "narrowly tailored" to remedying those alleged vestiges. Pet. App. 19a. In particular, the court found that Petitioners had failed to demonstrate that those alleged vestiges could not be remedied in a race-neutral manner. Pet. App. 26a-27a.

On December 30, 1994, the Court of Appeals denied Petitioners' motions for rehearing with suggestions for rehearing in banc. Pet. App. 30a-33a. The Kirwan Peti-

---

[5] The Court rejected the "racial hostility on campus" argument on the additional ground that Petitioners had presented no evidence that the alleged hostility was causally related to UMCP's previous discriminatory acts. Pet. App. 11a.

tioners and the Greene Petitioners filed separate certiorari petitions on March 29 and 30, 1995.

SUMMARY OF ARGUMENT

The court below struck down -- as a violation of Title VI and the Fourteenth Amendment's Equal Protection Clause -- UMCP's blacks-only scholarship program, ostensibly established for the purpose of remedying the school's past racial discrimination against blacks. Several factors counsel against this Court's review of the decision.

First, no other appellate court has addressed the propriety of such scholarship programs. That means, of course, that there is no direct conflict between the Fourth Circuit's decision and any other appellate decision. The allegedly conflicting decisions pointed to by Petitioners present fact patterns bearing little resemblance to this case. All of those decisions predate this Court's seminal affirmative action decisions, and most do not even arise within the context of higher education.

Second, although hundreds of colleges and universities administer race-based scholarship programs, it is not at all clear that those programs, because of their disparate criteria and justifications, will be affected by the Fourth Circuit's decision. Determining whether the factual predicates for a race-based scholarship program exist at a particular school is necessarily a fact-intensive exercise; the Fourth Circuit's decision that UMCP failed to establish those predicates does not prevent other schools from doing so. Moreover, the rationale behind the great majority of race-based scholarship programs in this country -- a desire to diversify the student body -- is not addressed by the Fourth Circuit's decision.

In any event, the Fourth Circuit's decision was virtually mandated by this Court's precedents. In *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court held that a state with a history of *de jure* segregated higher education must dismantle that system by: (1) adopting a

race-neutral admission policy; and (2) eliminating "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The undisputed record in this case demonstrates that Maryland and UMCP have long since fulfilled their obligations under *Fordice*. Accordingly, UMCP lacked any compelling reason to attempt to further "remedy" the effects of the pre-1954 segregated higher education system by adopting a racially discriminatory scholarship program.

Finally, Petitioners' claim that the Banneker Program served UMCP's compelling interest in a racially diverse student body is without support and is not properly presented for review. That claim has not been passed on by any of the federal courts that have considered this case. More importantly, Petitioners failed to raise that claim in response to Mr. Podberesky's initial motion for summary judgment and thus should not be permitted to raise it at this late date. Moreover, to the extent record evidence does exist, it indicates that achieving diversity was not in fact the reason UMCP adopted the Banneker Program.

REASONS FOR DENYING THE PETITIONS

In striking down a state-sponsored scholarship that discriminates on the basis of race, the Fourth Circuit was simply following clear-cut authority from this Court. A long line of decisions from the Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Moreover, the decision below does not conflict with decisions from any other federal appellate court. The Court should deny the petitions.

Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989)(plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very

nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court is also mindful of the potential harmful effect of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 113 S. Ct. at 2832.

Petitioners' establishment of a racially exclusive scholarship fund is no less suspect because it is employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-99 (1978)(Powell, J.). *Shaw v. Reno* puts to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination. In a decision that called into question the constitutionality of drawing congressional districting lines according to the race of constituents, the Court said:

> [T]he dissent argues that racial gerrymandering poses no constitutional difficulties when lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion); see also *id.*, at 520 (Scalia, concurring in judgment). Accord *Wygant* [*v. Jackson Board of Education*], 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw v. Reno, 113 S. Ct. at 2829.

Petitioners' attempts to distinguish *Croson, et al.*, are unavailing. They argue that "[t]he standards set out in *Croson* and *Wygant* . . . are inapplicable in this case" because in those cases, unlike this one, the allegedly remedial racial classifications were adopted "in the absence of any findings of discrimination." Kirwan Pet. at 17. That view of the law is a clear misreading of *Croson* and *Wygant*. Those decisions make clear that it is not the mere historical fact of past discrimination that triggers a state interest in remedial schemes; rather, the focus should be on whether there exist *present effects* of past racial discrimination. *Wygant*, 476 U.S. at 274 (plurality opinion). In the absence of such present effects, there can be no justification for race-conscious remedial measures. *Id.* Nothing in the language of *Croson* or *Wygant* supports Petitioners' contention that a finding of past discrimination lessens a state's heavy burden in attempting to justify a racial classification.[6]

I. THE DECISION BELOW WAS MANDATED BY THIS COURT'S *FORDICE* DECISION

Petitioners contend that the decision below overlooked and is inconsistent with this Court's case law regarding a state's affirmative obligation to take steps to eliminate vestiges of *de jure* segregated systems of education. Kirwan Pet. at 14-21; Greene Pet. at 17-20. That contention is without merit.

---

[6] Moreover, *Croson* is *not* factually distinguishable from this case. While all parties agree that UMCP excluded black students prior to 1954, the evidence of past discrimination against blacks was no less strong in *Croson*. That case involved government contracts set aside solely for minority-owned businesses by the City of Richmond, the capital of the Confederacy during the Civil War. Richmond had a centuries-long history of *de jure* discrimination against African Americans that continued well beyond 1954. *Croson* nonetheless imposed exacting scrutiny on Richmond's "remedial" set-aside program and focused exclusively on the *present effects* of past discrimination.

In *United States v. Fordice*, 112 S. Ct. 2727 (1992), a case in which the federal government was challenging the adequacy of Mississippi's desegregation efforts, the Court explained what a state must do in order to eliminate the vestiges of a *de jure* segregated higher education system. In addition to adopting a race-neutral admission policy, a state with a history of segregated higher education must also eliminate "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The Court explained:

> If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.

Id. at 2737.

Fordice dictates that this case focus on UMCP "policies" or "practices" that are having segregative effects. Once the issues are focused in that manner, Petitioners' case collapses. Petitioners have never identified a single UMCP "polic[y]" or "practice[]" traceable to the pre-1954 era that has or has had segregative effects. Even the district court found that UMCP has maintained race-neutral admissions procedures since 1954. Accordingly, UMCP has at all times since 1954 done all that is required of it under *Fordice*. Moreover, if there were such "policies" or "practices," *Fordice* dictates that they be

eliminated, not that UMCP adopt racially discriminatory programs designed to overcome their segregative effects.[7]

Petitioners' reliance on *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and other cases dealing with steps necessary to desegregate elementary and secondary schools (*see* Kirwan Pet. 15-17), is misplaced. The Court held in *Fordice* that dismantling formerly segregated institutions that obtain their participants through the voluntary choices of individual participants (a category that includes colleges and universities) does not require the broad-based affirmative remedies outlined in elementary/secondary school cases such as *Green*. *Fordice*, 112 S. Ct. 2736-37. Rather, a state's only obligation in the area of higher education is to eliminate un-

---

[7] Appellees cite *Knight v. Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994), for the proposition that a university harboring a racially hostile climate that has segregative effects and that is traceable to the segregative era is bound by *Fordice* to take steps to remedy that climate. Mr. Podberesky submits that that *dictum* in *Knight* is a clear misreading of *Fordice*; it is difficult to conceive how a campus climate could be considered to be a "policy" or "practice" of a university. *Fordice* might require a university to eliminate policies or practices (dating from the segregative era) that foster a racially hostile campus climate, but the climate itself is not something a university can control as a matter of "policy."

In any event, nothing in *Knight* is contrary to the result reached by the court below. *Knight* declined to order a remedy against Alabama based on the plaintiffs' "racially hostile campus" allegation, finding that the state was "doing all that [it could] practicably do" to address the issue through a variety of race-neutral programs designed to ease racial tensions (such as "symposia, student activities and services and university sponsored commemorations of the Civil Rights Movement and its leaders"). *Knight*, 14 F.3d at 1553. Since the Eleventh Circuit believed that Alabama could not be required to do more than it was doing to ease racial tensions, it clearly would not have condoned use of race-exclusive remedies (such as the Banneker Program) as a "narrowly tailored" means of achieving that goal.

warranted "policies and practices traceable to its prior system that continue to have segregative effects." Id.[8]

The instant case is factually distinguishable from *Fordice* in one respect: *Fordice* addressed the steps constitutionally *required* of a state in dismantling a segregated higher education system, while this case concerns the propriety of "remedial" actions *voluntarily* undertaken by UMCP. *Croson* makes clear, however, that that distinction is of little moment. A state may implement a voluntary race-based "remedial" program only if there exists a "strong basis in evidence" that remedial action is constitutionally required and only if the program is narrowly tailored to achieving its remedial goals. *Croson*, 488 U.S. at 507-508. Petitioners cannot begin to make the showing required under *Croson* in the absence of any evidence of the types of "policies" or "practices" identified in *Fordice*.

In light of *Fordice*, there is no basis for challenging the appeals court's holding that two of the four alleged continuing effects of past UMCP discrimination -- UMCP's allegedly poor reputation within Maryland's African American population and its allegedly racially hostile campus climate -- are insufficient as a matter of law to justify a race-based remedial program. As the appeals court noted (Pet. App. 10a), it will always be a historical fact that UMCP discriminated against blacks prior to 1954; thus, there is no way that UMCP can "remedy" knowledge of that fact other than to erase history. If a black Maryland high school senior chooses not to attend UMCP because he/she wishes not to be associated with a school that used to exclude blacks 40 years ago, that is an individual choice that is beyond UMCP's control. Certainly, nothing in the record suggests that UMCP has any

---

[8] *See also Bazemore v. Friday*, 478 U.S. 385, 387-88 (1986)(4-H and Homemaker Clubs, which rely solely on voluntary choices of individuals in obtaining members, have taken sufficient remedial action to remove all vestige of the formerly segregated club operations when they implement "voluntary choice" membership policies).

"policies" or "practices" that foster increased public awareness of UMCP's segregated past.[9]

Case law cited by Petitioners stands for the proposition that, in the period immediately after racial exclusion is ended, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage blacks from applying for positions they affirmatively seek. *See, e.g., Sheet Metal Workers v. EEOC*, 478 U.S. 421, 477 (1986) (plurality opinion).[10] Nothing in *Sheet Metal Workers* stands for the proposition that such remedies are warranted -- 40 years after racial discrimination has ended -- for the purpose of attracting black applicants to a school which they otherwise might not have considered attending. Moreover, the federal courts of appeals are unanimous in rejecting evidence of a reputation for discrimination in the distant past as sufficient justification for a race-based remedial program. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994); *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), *reh. denied*, 826 F.2d 73, 76-77 (D.C. Cir.), *cert. denied*, 486 U.S 1036 (1988).

The appeals court's refusal to consider evidence regarding the allegedly hostile racial climate at UMCP is

---

[9] There is also no evidence that UMCP has "policies and practices traceable to its prior [segregated] system" that cause the alleged underrepresentation of blacks or UMCP's black/white retention rate differential.

[10] The *Sheet Metal Workers* plurality permitted race-based remedies for racial discrimination that ended in the immediate past because, in the absence of race-based remedies, blacks who wished to become union members would have faced impediments in simply gaining access to the membership-signup process, and would have been "discourage[d] . . . from even applying for membership" based on a belief that any application would be rejected for racially discriminatory reasons. *Id.* In contrast, Petitioners have presented no evidence that black Marylanders believe that UMCP still discriminates against blacks in the admissions process.

similarly unobjectionable. There is no allegation that the allegedly hostile climate is fostered in any way by policies or practices of UMCP's administration; in the absence of such an allegation, *Fordice* counsels that UMCP has no interest in altering that climate sufficiently compelling so as to justify a race-exclusive remedy. *Fordice*, 112 S. Ct. at 2736-37. As the lower court noted, to permit Petitioners to employ racially discriminatory remedies in order to counteract racial hostility allegedly perceived by African Americans at UMCP -- a hostility similar to that perceived by blacks nationwide, on and off college campuses[11] -- would amount to nothing more than employing race-based remedies to confront general societal discrimination. This Court has never permitted race-based remedies to be used for that purpose. *See, e.g., Wygant*, 476 U.S. at 276 (plurality opinion).

II. THE DECISION BELOW WAS FULLY CONSISTENT WITH CASE LAW REGARDING "NARROWLY TAILORED" REMEDIES

The court below directed entry of summary judgment for Mr. Podberesky on the ground that Petitioners had failed to meet their evidentiary burden of demonstrating that the Banneker Program was "narrowly tailored" to eliminating present effects of past racial discrimination at UMCP. Pet. App. 18a-28a. That holding was fully consistent with the evidence and this Court's case law.

In particular, the court below found the Banneker Program deficient due to Petitioners' failure to sufficiently consider race-neutral alternatives to the program. *Id.* at 27a. This Court has repeatedly emphasized the importance of limiting race-exclusive "remedies" to those few situations in which race-neutral alternatives are unavailable. *Croson*, 488 U.S. at 507; *United States v. Paradise*, 480 U.S. 148, 171-177 (1987)(plurality

---

[11] *See, e.g., Ayers v. Fordice*, No. 4:75CV009-B-O, ___ F. Supp. ___ (N.D. Miss. Mar. 7, 1995)(slip op. at 72).

opinion). As the Fourth Circuit recently held, in the context of the City of Charlotte police department's race-based promotion program:

> The essence of the "narrowly tailored" inquiry is the notion that explicit racial preferences, if available at all, must be only a "last resort" option. Without evidence that the City considered race-neutral alternatives to achieve diversity, or that the use of a nondiscriminatory policy would not achieve its goal, we simply cannot hold that the City's promotion policy was narrowly tailored.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993). *Hayes* explained that any race-preference policy not adopted as a "last resort" is improper, regardless that the burden imposed on third parties by the preference policy might not be large. *Id.*

Each of the goals that Petitioners sought to achieve through the Banneker Program could have been achieved by race-neutral means. If the alleged "present effect" of past discrimination is a negative reputation of UMCP among Maryland blacks, then there are a whole host of race-neutral, public relations-oriented means of counteracting that reputation. Moreover, programs that discriminate on their face on the basis of race are unlikely to be effective in convincing blacks that UMCP has eliminated racial discrimination.

If the alleged "present effect" is the racial climate at UMCP, the narrowly tailored response would be a race-neutral campus program designed to reduce and address "racial incidents" on campus and to promote understanding among students of different races. The Banneker Program -- by stigmatizing blacks and promoting resentment among nonblack students (*see, e.g.*, J.A. 2979) -- has precisely the wrong effect. As Justice Powell recognized in *Bakke*:

> All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be

> viewed with deep resentment by the individuals burdened. . . One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

Bakke, 438 U.S. at 294 n.34 (Powell, J.).[12]

If the alleged "present effect" is lower retention and graduation rates at UMCP for blacks than for whites, then the narrowly tailored (and only effective) remedy is to eliminate the causes of the conditions that lead to the lower rates, including lack of finances to continue in college and academic difficulties. Such a remedy would entail awarding need-based scholarships to those successfully pursuing a college education, and devoting additional funds to tutoring and counseling.[13] The non-need-based Banneker Program does neither. It may attract academically talented (usually middle or upper class) black students who are likely to graduate from whatever college they attend, but any resulting increase in UMCP graduation and retention rates would be no more than window dressing for the school; it would be unrelated to UMCP's current (allegedly) low graduation and retention rates among blacks.

Even within the context of merit-based scholarship programs, there are more narrowly tailored alternatives to

---

[12] To the extent that black enrollment at UMCP is a function of its reputation and racial climate, implementing the race-neutral steps outlined above for improving UMCP's reputation and climate would also remedy any alleged "underrepresentation" of blacks at UMCP.

[13] As the Fourth Circuit recognized, the evidence demonstrated that the factors most likely to lead to students dropping out of UMCP were: (1) living off campus with a long commute; (2) having a job with long hours; and (3) having to provide one's own living expenses. Pet. App. 26a. When those factors are controlled for, the attrition rate is no higher for blacks than for whites. *Id.*

the Banneker Program.[14] Indeed, following the Fourth Circuit's ruling in this case, UMCP was able to identify a significant number of high-achieving African Americans to whom to award merit-based scholarships even though it no longer sets aside scholarships exclusively for members of one race.[15] A race-exclusive Banneker Program is constitutionally indefensible in light of UMCP's demonstrated ability to accomplish its allegedly remedial goals without resort to racial set-asides.

The Fourth Circuit rightly faulted the Banneker Program for its sole focus on high-achieving black students. Pet. App. 20a. The evidence is uncontested that UMCP has not discriminated in any way against the past two generations of black high school students. Moreover, the evidence indicates that high achievers, whether African Americans or not, experience high retention and graduation rates at UMCP. Accordingly, even if lower graduation rates among black Marylanders at UMCP were found

---

[14] Administrative inconvenience was the only reason given by UMCP for not implementing a race-neutral academic scholarship program that takes into account a wide variety of academic factors -- but downplays reliance on GPAs and SAT scores, two areas in which the disparity between top black candidates and top white candidates is huge. J.A. 2893-94. But this Court has made clear that administrative inconvenience is not an adequate reason to reject a more narrowly tailored, race-neutral remedy.

[15] Pending a final ruling from this Court, UMCP has combined its two merit-based scholarship programs into a new program called the Banneker-Key Scholarship Program. According to a recent issue of *The Diamondback*, UMCP's student newspaper, blacks constitute 40% of the 65 incoming freshmen awarded four-year Banneker-Key Scholarships in 1995. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). In selecting Banneker-Key awardees, UMCP takes race into account as one factor among many for the purpose of obtaining a diverse group of awardees, but no scholarships are set aside exclusively for members of any racial group. *Id.* UMCP's ability to locate so many deserving, high-achieving black candidates without resorting to racial set-asides is particularly significant given that blacks constitute only about 15% of UMCP's applicant pool.

to be evidence that past discrimination is having a continuing effect, the Banneker Program does nothing to assist those suffering from the continuing effects and thus cannot be said to be narrowly tailored to remedying those effects.

Petitioners complain that the Fourth Circuit's ruling "conflicts with the well-settled principle that race-based relief may benefit 'individuals who were not the actual victims of a defendant's discriminatory practices.'" Kirwan Pet. at 21 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). Petitioners err; there is no conflict. While a race-based remedial program will not automatically be held unconstitutional merely because the group benefited includes some who are not themselves the victims of past racial discrimination, the Court has made clear that a "narrowly tailored" remedy is one that "tailor[s] remedial relief to those who truly have suffered the effects of prior discrimination." *Croson*, 488 U.S. at 508. In this case, UMCP made no effort to tailor its remedy in that manner, but rather confined race-based benefits to those African Americans (predominantly high-achieving, middle or upper-income blacks) *least* likely to be suffering effects from UMCP's pre-1954 exclusion of blacks.[16]

Petitioners also argue that race-exclusive remedial programs are not even subject to a "narrowly tailoring" requirement when, as Petitioners contend is the case here, "the rights of third parties are not appreciably affected." Kirwan Pet. at 19. Petitioners are wrong on both the law and the facts. The Court has made clear that the Fourteenth Amendment requires *all* state action "that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest" (*Shaw*, 113 S. Ct. at 2816), without

---

[16] African Americans living outside Maryland are also highly unlikely to be suffering effects from UMCP's pre-1954 exclusion of blacks; yet, in 1992 (the last year for which information is available in the record) 17 of 31 Banneker Scholarships went to nonresidents of Maryland, and scholarships have even been offered to noncitizens.

regard to the "burden or benefit" imposed thereby on members of various racial groups (*id.* at 2829).

Moreover, the evidence in this case establishes that Mr. Podberesky and others were substantially burdened by the race-exclusive nature of the Banneker Program. The Banneker Program provides an extremely valuable scholarship; it would have been worth about $35,000 to Mr. Podberesky over his four years at UMCP, and is now worth nearly $60,000 to students from outside Maryland. UMCP has all but conceded that Mr. Podberesky (in light of his stellar academic qualifications) would have been awarded a Banneker Scholarship had he been black instead of Hispanic. Accordingly, Mr. Podberesky's race-based exclusion from the Banneker Program -- a program that awarded about 50% of all academic scholarship funds offered by UMCP -- was no small matter. Furthermore, all UMCP students were substantially burdened by the Banneker Program, since its $1.2 million annual cost came directly from UMCP funds, funds that are raised in large measure through student tuition charges.[17]

Petitioners also insist that the Banneker Program is similar to "other race" scholarship programs operated in other states,[18] and that the Court should grant review because the Fourth Circuit's decision calls into question the constitutionality of all such programs. Greene Pet. at 23-24. Petitioners' claim is false; the Banneker Program

---

[17] Petitioners' claims that Banneker Program funds make up a small fraction of all financial aid at UMCP fail to point out that the vast majority of that aid is provided by the federal government and is need-based. If such aid and athletic scholarships are not considered, the Banneker Program accounts for a significant percentage of scholarship outlays by UMCP.

[18] An "other race" scholarship program is one that makes financial aid available to students without regard to race, provided only that the student use the funds at a school where a majority of students are of another race. Thus, whites could use "other race" grants only at Historically Black Institutions (HBIs), and blacks could use "other race" grants only at Historically White Institutions (HWIs).

is not an "other race" scholarship program as that term is commonly understood, and thus this case does not provide an opportunity for the Court to decide whether such programs can withstand Fourteenth Amendment scrutiny.

We note initially that although the State of Maryland appears to operate an "other race" program, the record indicates that UMCP does not obtain any funding under that program for Banneker Scholarships, but rather finances the Banneker Program from general operating funds. Moreover, an "other race" program cannot pretend to qualify as race-neutral unless all students have an equal opportunity to compete for available funds without regard to their race. That result can only be achieved if funding is awarded on a state-wide basis. The UMCP-funded Banneker Program does not meet that requirement. In failing to consider Mr. Podberesky for a Banneker Scholarship, UMCP denied him the chance to compete for one of about 30 four-year, all-expenses-paid grants worth about $35,000 each -- a scholarship opportunity that is without parallel at any of Maryland's four HBIs.

In sum, the Fourth Circuit's finding that the Banneker Program is not "narrowly tailored" is fully consistent with this Court's case law.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY RECENT APPELLATE DECISIONS

Petitioners contend that the decision below conflicts with several other federal appellate decisions. Other than the inconsequential conflict with *dicta* from an Eleventh Circuit decision cited in Note 7, that simply is not true.

Mr. Podberesky notes initially that most of the other appellate decisions upon which Petitioners rely did not arise within the context of higher education. A determination regarding whether a racial preference can withstand strict scrutiny is, of necessity, highly fact specific; thus, it is somewhat disingenuous to assert that the Fourth Cir-

cuit's holding "conflicts" with decisions that did not even arise within a similar factual setting.

Petitioners cite two employment discrimination decisions (both more than two decades old) for the proposition that race-exclusive remedies are justified for the purpose of eliminating an employer's "poor reputation in the black community." Kirwan Pet. 24-25. *See Murrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.)(en banc), *cert. denied*, 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Neither decision conflicts with the decision below. *Murrow* and *Carter* presage *Sheet Metal Workers* in holding that, in the immediate aftermath of the elimination of rules barring employment of blacks, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage qualified blacks from applying for jobs because they assume their applications would not be considered.

Neither *Carter* nor *Morrow* suggests that race-conscious remedies may be continued *indefinitely* for the purpose of overcoming reputational barriers.[19] Moreover, the reputational barriers at issue in those cases are not at all similar to the reputational "barriers" relied on by Petitioners. There is no allegation in this case that Maryland blacks are reluctant to apply to UMCP because they perceive that their applications will not be considered fairly.[20] Rather, Petitioners allege that some Maryland

---

[19] *Carter* and *Morrow* are fully consistent with more recent case law that questions whether courts should ever attempt to trace a causal relationship between racially discriminatory acts in the distant past and alleged present effects of those acts. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir.1993), *cert. denied*, 114 S. Ct. 1190 (1994).

[20] Indeed, such a perception would be surprising, because the evidence demonstrates that blacks are afforded a tremendous preference in the UMCP admission process. For example, in 1990, 108 of 204 blacks (53%) with SAT scores between 750 and 800 were admitted, (continued...)

blacks are reluctant to attend UMCP because it used to exclude blacks and because they might not feel comfortable attending a school whose student body is overwhelmingly white. Nothing in *Carter* or *Murrow* supports use of race-exclusive remedies as a means of overcoming that sort of reputational "barrier."

Petitioners also allege that, in contrast to the court below, "the Eighth, Eleventh, and Sixth Circuits have upheld the validity of race-based remedial action implemented under circumstances virtually identical to those under which the Banneker Program arose." Kirwan Pet. 26. None of the three decisions cited by Petitioners (which pre-dated *Fordice, Croson,* and other landmark Supreme Court decisions regarding race-based remedial action) conflict with the Fourth Circuit's decision. In *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), the Sixth Circuit upheld a consent decree mandating race-conscious remedial action in Tennessee's higher education system. The procedural posture of that case serves to distinguish it; it involved the validity of a consent decree, an issue not present here. The Sixth Circuit based its decision in part on an unwillingness to overturn a settlement supported by all parties after 16 years of litigation (*Geier*, 801 F.2d at 809) and in part on its deference to detailed district court factual findings that identifiable vestiges of past discrimination remained within the Tennessee university system.[21] Moreover, the Sixth Circuit's later decision in *Brunet* makes clear that *Geier* should not

---

[20] (...continued)
while only 10 of 197 whites (5%) with SAT scores in the same range were admitted. In the same year, 292 of 488 blacks (60%) with GPAs between 2.00 and 2.49 were admitted, while only 531 of 1803 whites (29%) with GPAs in the same range were admitted. J.A. 530.

[21] The Sixth Circuit's decision was also based on a holding that higher education desegregation litigation was controlled by *Green* and other Supreme Court case law addressing desegregation of elementary and secondary schools. *Id.* at 804. This Court's subsequent decision in *Fordice* makes clear that the Sixth Circuit erred in that respect.

be read as countenancing race-conscious action designed to "remedy" racial discrimination in the distant past.

The Eighth Circuit's decision in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), is also factually distinguishable. *Valentine*, an employment discrimination case, involved a challenge by a white employee to an affirmative action hiring plan adopted by Arkansas State University shortly after OCR made informal determinations that vestiges of discrimination existed within Arkansas's higher education system. The Eighth Circuit upheld the plan, based in large part on its finding that a prior D.C. Circuit decision had found recent Title VI violations within Arkansas's higher education system.[22] *Valentine* lends no support to Petitioners' claims that 25-year-old OCR discrimination charges are sufficient to justify present-day remedial measures.

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984), is the other federal appellate decision alleged by Petitioners to conflict with the Fourth Circuit's decision. *Palmer* is an employment discrimination case with very little factual similarity to the instant case. Indeed, the white plaintiff in that case stipulated that his employer's affirmative action hiring plan was "valid," and thus the Eleventh Circuit declined to address that question. *Palmer*, 748 F.2d at 600-601. In subsequent employment discrimination litigation, the Eleventh Circuit has subjected race-based "remedial" action to the same exacting scrutiny that the Fourth Circuit applied here. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *In re Birmingham Re-*

---

[22] In fact, the Eighth Circuit misread the D.C. Circuit decision, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)(*en banc*). *Adams* had made no finding one way or the other regarding Title VI violations in Arkansas; indeed, Arkansas was not even a party to the *Adams* litigation. Nonetheless, since the holding in *Valentine* is based on the erroneous finding that the D.C. Circuit had found Arkansas to be in violation of Title VI, the presence of that finding distinguishes *Valentine* from the instant case.

verse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994), *cert. denied sub nom., Martin v. Wilks*, ___ U.S. ___, 63 U.S.L.W. 3754 (April 17, 1995).

Petitioners also contend that the Fourth Circuit's decision is inconsistent with the U.S. Department of Education's (DOE) policy guidance regarding the application of Title VI to race-based college scholarships. *See* 59 Fed. Reg. 8956 (Feb. 23, 1994). That document speaks in generalities and does not indicate whether DOE believes that Title VI permits creation of a race-exclusive scholarship program given the factual record in this case. Any inconsistency between the DOE policy guidance (which purports to interpret existing law) and the Fourth Circuit's decision provides no basis for granting the Petition (S. Ct. R. 10.1); it would be merely an indication that the policy guidance is in need of revision.

Furthermore, DOE's interpretation of Title VI is of no relevance to two of Mr. Podberesky's three claims -- those arising under the Equal Protection Clause and 42 U.S.C. § 1981. Nor is DOE's interpretation of Title VI entitled to deference from the courts. The Court has held that the proscriptions of Title VI are largely coterminous with the proscriptions of the Equal Protection Clause with respect to the activities of a state or its agencies. *Fordice*, 112 S. Ct. at 2737-38 n.7; *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 590 (1983). Since a federal agency's interpretation of the Constitution is not entitled to deference from the courts (*Weinberger v. Salfi*, 422 U.S. 749 (1975)), there is no justification for courts to defer to a federal agency's interpretation of a statute that is coterminous with the Constitution.

IV. PETITIONERS HAVE NOT PROPERLY RAISED THE "DIVERSITY" ISSUE

The Kirwan Petitioners also seek review of the Fourth Circuit's decision based on their claim that the Banneker Program served UMCP's compelling interest in a racially

diverse student body. Kirwan Pet. 27-30. The "diversity" issue was not passed on by the Fourth Circuit and is not properly before the Court.

When Mr. Podberesky first sought summary judgment from the district court in 1991, the Kirwan Petitioners did not seek to defend the Banneker Program based on a "diversity" rationale. Rather, their sole defense was that the program was designed to overcome the effects of past UMCP racial discrimination. It was only after Mr. Podberesky appealed from the denial of his motion that UMCP for the first time raised the "diversity" rationale as an alternative defense. Accordingly, when the Fourth Circuit remanded the case to the district court in January 1992 for reconsideration of Mr. Podberesky's summary judgment motion, it quite rightly limited the remand to consideration of the "remedying past discrimination" defense. Pet. App. 107a-108a. Fed. R. Civ. P. 56 demands no less; a party that defends against a summary judgment motion based on one rationale may not avoid entry of judgment by raising an entirely new rationale after the initial rationale is rejected.

Were the Court nonetheless to agree to consider Petitioners' "diversity" defense, it would be forced to do so with very little guidance; none of the lower courts that have reviewed this case have passed directly on the "diversity" issue.[23] An issue raising such important constitutional questions (and which has not been directly addressed by the Court since its fractured decision in *Bakke* in 1978) should not be decided on such a thin record.

Moreover, the record is clear that a desire for "diversity" played no role in creation of the Banneker

---

[23] Petitioners have only themselves to blame for that state of affairs. Even when the case came before the Fourth Circuit for the second time, Petitioners sought to avoid a ruling on the "diversity" issue. Rather, Petitioners advised the appeals court that should it reverse the district court, it should remand the case for consideration of the "diversity" issue in the first instance by the district court.

Program in 1978 and in its continuation in 1990 at the time that Mr. Podberesky sought to be considered for a scholarship.[24] "Diversity" only arose as an issue in response to this lawsuit. When a racial classification is challenged, a state may not defend its conduct based on just any rationale it can divine during litigation. Rather, the rationale advanced must be one that actually led to creation of the program. *Coral Construction Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992). Accordingly, while Petitioners are entitled to defend a new race-based scholarship program on a "diversity" rationale, they may not resist Mr. Podberesky's claims based on a rationale for the Banneker Program invented after suit was filed.

CONCLUSION

Respondent Daniel J. Podberesky respectfully requests that the Court deny the petitions for certiorari.

Respectfully submitted,

SAMUEL PODBERESKY
253 Milthorn Court
Riva, MD 21140
(410) 269-1635

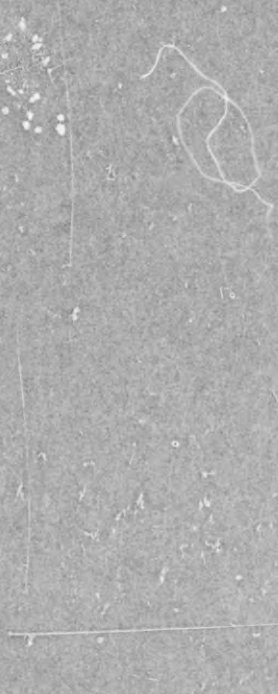
DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Respondent

Dated: May 1, 1995

---

[24] Indeed, Petitioner Kirwan stated earlier this month, "In neither scholarship program before [consolidation of the Banneker and Key programs] was diversity a specific [selection] criterion because the Banneker was for African Americans and the students getting the Key Scholarship have been a quite diverse group of people. . . . It was only when we combined the two pools that we have diversity as a criterion." *See* "Banneker's future affected by many," *The Diamondback* at 1 (April 13, 1995).



Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

Nos. 91-1620, 91-1621

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL. IN SUPPORT OF PETITIONER

MARCIA GREENBERGER
VERNA L. WILLIAMS
NATIONAL WOMEN'S LAW CENTER
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

DAVID H. COBURN
Counsel of Record
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae National Women's Law Center, et al.

May 1, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
ARGUMENT	2
I. THE HISTORY OF DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION IS LONG AND PERVASIVE	6
II. THE HISTORICAL DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION HAS GENERATED PRESENT EFFECTS THAT WARRANT REMEDIAL MEASURES	9
III. AN EXTENSIVE NETWORK OF GENDER-BASED PROGRAMS HAS BEEN ESTABLISHED TO ERADICATE THE EFFECTS OF PAST DISCRIMINATORY PRACTICES AND PREJUDICES	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Brown v. Board of Education, 349 U.S. 294 (1955) 3
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 3
Frontiero v. Richardson, 411 U.S. 677 (1973) 5
Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) 2
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) 6
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 6
Podberesky v. Kirwan, 838 F. Supp. 1075 (D. Md. 1993), *rev'd*, 38 F.3d 147 (4th Cir. 1994) 4
Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) 2, 4
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 6
Sharif v. N.Y. State Educ. Dept., 709 F. Supp. 364 (S.D.N.Y. 1989) 10
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 2
United States v. Fordice, 112 S. Ct. 2727 (1992) 2
United States v. Paradise, 480 U.S. 149 (1987) 3
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 3, 4

STATUTES & REGULATIONS

20 U.S.C. §§ 1681-1688 ..... 6, 10
34 C.F.R. § 106.3 6
34 C.F.R. § 106.37(b) 11

FEDERAL REGISTER

U.S. Dept. of Educ., *Nondiscrimination in Federally Assisted Programs*, 49 Fed. Reg. 8756 (1994) 4

MISCELLANEOUS

American Association of University Women, *How Schools Shortchange Girls* (1992) 9

TABLE OF AUTHORITIES—Continued

Page

American Council on Education, *Increase of Women Majoring in Nontraditional Fields Slows Dramatically*, About Women on Campus (Fall 1994) 10

American Council on Education, *Minorities in Higher Education 1994, 13th Annual Report* (Mar. 1995) 9

Katherine Conner & Ellen Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 Berkeley Women's L.J. 13 (1992) 10

Mary Moran, *Student Financial Aid and Women: Equity Dilemma?* (Jonathan D. Fife ed. 1986) 10

Gayle Schlacter, *Directory of Financial Aids for Women 1995-1997* (1994) 12, 13

Barbara M. Solomon, *In the Company of Educated Women* (1985) 7, 8

Task Force on Women in Higher Education, *Women in Academe: Progress and Prospects* (Mariam K. Chamberlain ed. 1988) 7, 8

U.S. Dept. of Educ., *National Center for Education Statistics: Digest of Education Statistics 1994* 9

Kenneth L. Wilson & Janet P. Boldizar, *Gender Segregation in Higher Education: Effects of Aspirations, Mathematics Achievement, and Income*, 63 Soc. Educ. 62 (Jan. 1990) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

No. 94-1621

MONICA GREENE, *et al.*
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici Curiae are 11 women's rights and civil rights organizations sharing a strong commitment to the protection of the rights of women and the elimination of unlawful discrimination against women.[1] They litigate and

[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Clerk.

educate the public to secure equal rights for women in all aspects of American life, including higher education. Individual statements of interest of the *amici* are reproduced in the Appendix.

The decision of the court of appeals, *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), is of far-reaching significance because it threatens the broad array of financial assistance now offered to thousands of women students nationwide as a means of redressing the effects of past discrimination in higher education. Such programs exist because, as public and private entities have recognized, the elimination of the persistent effects of historical discrimination against women requires ameliorative measures. For women of color, particularly African-American women, these programs are especially critical because the opportunities for them to pursue higher education have been severely restricted by the combination of discrimination based on gender and on race.

ARGUMENT

In the decision below, the court of appeals held that the University of Maryland at College Park ("UMCP") may not maintain a race-based scholarship program that UMCP officials have concluded is necessary to ameliorate the lingering vestiges of the state's long history of discrimination against African-Americans in higher education. In so holding, the court of appeals ignored this Court's recent decision in *United States v. Fordice*, 112 S. Ct. 2727 (1992), which confirmed that a state that once maintained a dual system of education *de jure* has a "constitutional duty to dismantle the dual school system that its laws once mandated." 112 S. Ct. at 2735. The Court in *Fordice* made clear that "this obligation applies to [the state's] higher education system," as well as to its primary and secondary schools. *Id.*; *see, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County School Bd. of New Kent*

County, 391 U.S. 430, 437-38 (1968); *Brown v. Board of Education*, 349 U.S. 294 (1955).

Instead of focusing on the case law involving institutions that have engaged in unlawful discrimination in the past, the court of appeals relied on decisions assessing the validity of race-conscious programs voluntarily adopted by public employers in the absence of any findings of past discrimination. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). *Wygant* and *Croson* are clearly distinguishable from this case for at least one reason: no one disputes that UMCP discriminated against African-Americans for many years.[2] Indeed, under such circumstances, the Court has recognized a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant*, 476 U.S. at 291 (O'Connor, concurring) (citing *Swann*) (emphasis in original). *See also United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion) (upholding race-conscious relief imposed to remedy "the pervasive, systematic, and obstinate discriminatory conduct" of the public employer).

That UMCP has not been adjudged by a court to be in violation of the Constitution is of no moment. Surely, a public institution need not wait until it is subject to the contempt power of a federal court before it implements remedial action to redress the effects of its own past wrongs. UMCP's desegregation plan, of which the challenged Banneker Scholarship program is an important component, was developed in response to ongoing pressure from the Department of Education's Office of Civil

---

[2] The history of discrimination at UMCP is set out in the Petitions and will not be repeated here. *See* Petition for a Writ of Certiorari, *Kirwan v. Podberesky*, No. 94-1620 ("Kirwan Pet.") at 6-11; Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, *Greene v. Podberesky*, No. 94-1621 ("Greene Pet.") at 3-6.

Rights, which has yet to approve the University's efforts to desegregate. *See* Kirwan Pet. at 8-11. And the University itself engaged in extensive administrative fact-finding that confirmed the need for and the efficacy of the Banneker program. *Id.* at 4.

In these circumstances the court of appeals erred in failing to uphold the University's decision to retain the Banneker program. *See Wygant*, 476 U.S. at 277 (in assessing a claim of reverse discrimination, "the trial court must make a factual determination that *the employer* had a strong basis in evidence for *its* conclusion that remedial action was necessary") (emphasis added); U.S. Dept. of Educ., *Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. 8756, 8757 (1994) (a finding by "a court or an administrative agency—such as the Department's Office of Civil Rights"—that race-conscious relief is necessary to "overcome the effects of past discrimination" justifies such relief, as does a "strong basis in evidence" that such relief is necessary, absent a formal finding).[3]

Amici submit that the failure of the court of appeals to give proper weight to the history of race discrimination in assessing the Banneker program casts a shadow on the continued viability of gender-based scholarships designed to remedy historical discrimination faced by women in higher education. To a large extent, the history of discrimination against women in higher education,

---

[3] It seems that in this case the district court and the court of appeals used different approaches. The district court appears to have evaluated the University's findings based on the adequacy of the record that the University had assembled. *See* 838 F. Supp. at 1083 ("I am of the view that all four of UMCP's findings [of present effects of past discrimination] are supported by strong evidence."). The court of appeals, on the other hand, examined the evidence itself and concluded that disputed issues of material fact precluded summary judgment in favor of UMCP. 38 F.3d at 157. The district court's approach is more consistent with this Court's jurisprudence. *See Wygant*, 476 U.S. at 277.

as in other fields, mirrors the discrimination against African-Americans that the Banneker program was intended to redress. This Court has recognized the common characteristics of the nature and impact of race and gender discrimination.

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

The roots of sex discrimination run just as deep in the realm of higher education as they do in other areas. Women were denied access to the most prestigious American universities well into the 1950's, and the historical limitations placed on the fields of study open to women continue to have effects today in areas such as engineering and mathematics, where women continue to be underrepresented. An extensive network of gender-based scholarships and other gender-based programs has emerged to redress the legacies of this past discrimination.

The decision below is so expansive that, at the very least, educational authorities, both public and private, could well be reluctant to continue to use gender-based

scholarships for fear of provoking a legal challenge.[4] The chilling effect that that decision will have on such scholarships threatens to reverse the positive impact that such scholarships have had in eradicating the present effects of past discrimination against women.[5] This Court thus should grant the petitions for certiorari and reverse the decision of the court of appeals because of its far-reaching implications.

I. THE HISTORY OF DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION IS LONG AND PERVASIVE

Discrimination against women in higher education initially took the form of outright exclusion. Once colleges and universities began admitting women, a variety of measures were used to limit their participation. These practices have had the effect of steering women away from

---

[4] *Amici* recognize that, under this Court's jurisprudence to date, the standards governing the constitutionality of race-based classifications are different from those governing gender-based classifications. *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (applying strict scrutiny for race based classifications); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying "heightened scrutiny" to gender-based classifications); *J.E.B v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 n.6. (1994) (reserving the question of whether strict scrutiny should apply to gender discrimination). While these different standards might have supported a different result below had this been a case involving a gender-based scholarship program, it is questionable whether government or private scholarship sponsors would assume the risk of litigation by retaining either gender- or race-based scholarship programs were the decision below allowed to stand.

[5] Department of Education regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, permit the use of affirmative actions, such as scholarships, to "overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex." 34 C.F.R. § 106.3. The court of appeals decision, if allowed to stand, would cause questions to arise about the validity of this regulation.

the traditionally male-dominated fields and into lower paying occupations. Although women continue to be underrepresented in such fields, programs targeting women have had a significant impact in reversing this trend.

The discrimination against women in higher education began with the founding of the first American institution of higher education. In 1636, Harvard College opened for men only. Not until 1943 did Harvard admit its first female student.[6] Princeton and Yale Universities did not allow women to enroll until as recently as 1969.[7] Women's progress at state universities tended to be more rapid, but was not uniform. While the University of Iowa accepted women beginning in 1855, the University of Virginia did not permit women to enroll until 1970.[8]

Indeed, early advances by women in higher education were neither uniform nor consistent, since women's progress remained captive to prevailing social mores. Concerns that women distracted men in the classroom, or conversely deterred men from taking certain classes, led many educational institutions to limit the scope of coeducation. Some colleges and universities enforced strict limitations on the number of women permitted to be enrolled each year.[9]

Other institutions limited the presence of women on campuses by demanding stronger qualifications of women than of men. For example, higher test scores and grade point averages were the necessary prerequisites for the

---

[6] Barbara M. Solomon, *In the Company of Educated Women* 188 (1985).

[7] Task Force on Women in Higher Education, *Women in Academe: Progress and Prospects* 359 (Mariam K. Chamberlain ed. 1988).

[8] Solomon, *supra* note 6, at 56.

[9] Stanford University, for example, admitted only one woman student for every three men. Chamberlain, *supra* note 7, at 5.

admission of women at both the University of Michigan and Cornell University.[10] As recently as 1970, the University of North Carolina's admissions policy explicitly stated that the "admission of women on the freshmen level will be restricted to those who are exceptionally well qualified." [11]

Women also faced discriminatory hurdles to obtaining financial assistance. At Columbia University, for instance, the largest fellowships were reserved for men. And among the smaller fellowship awards, women were eligible for only four out of a total of thirty-two.[12]

Although the enrollment of women in colleges increased throughout the early 1900's, discriminatory stereotypes and prejudices profoundly affected their choice of study and pursuit of recreational activities. Women were expressly denied entrance to fields of study that were considered exclusively male provinces. For example, Harvard did not admit women to its medical school until 1945, to its law school until 1950, and to its business school until 1963.[13] Instead, women were steered into teaching and nursing-related professions. As a result of these discriminatory practices and stereotypes, the majority of women who earned bachelors degrees entered teaching or nursing-related professions until as recently as the 1970's.[14]

Thus, discrimination against women in this country's institutions of higher learning has been profound. As is true of racial discrimination, the effects of this long history of discrimination against women continue to be felt today.

---

[10] Chamberlain, *supra* note 7, at 209.

[11] *Id.* at 18 (quoting statement of the University of North Carolina).

[12] Solomon, *supra* note 6, at 136.

[13] Chamberlain, *supra* note 7, at 359.

[14] Solomon, *supra* note 6, at 126.

II. THE HISTORICAL DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION HAS GENERATED PRESENT EFFECTS THAT WARRANT REMEDIAL MEASURES

The long tradition of discriminatory practices and prejudices continues to impact upon the range of opportunities available to women in higher education in a number of ways. Women lag behind men in degrees earned in nearly all "technical" fields, particularly math, science and engineering.[15] For example, in 1992 men earned 66,716 bachelors degrees in engineering or related fields. College women, on the other hand, earned only 10,825 of these degrees. The data are even more graphic for African-American and Latina women, who, in 1992, earned only 997 and 431 engineering degrees, respectively.[16] Similar results are found in comparisons of women and men in computer science and other scientific fields.[17]

The data on women earning advanced degrees in these historically male-dominated fields underscore the extent to which prior discrimination continues to affect the opportunities for women today. In the physical sciences, including chemistry and astrophysics, women earned only 962 doctorates in 1992, while men earned 3,429.[18] And

---

[15] U.S. Dept. of Educ., *National Center for Education Statistics: Digest of Education Statistics 1994* at 253 (Table 239); American Association of University Women, *How Schools Shortchange Girls* 24-29 (1992). The difficulty in entering math and science related professions is critical in terms of high school girls' future earning potential. Studies have shown that mathematics specialization is a critical determinant in income earning potential. *See* Kenneth L. Wilson & Janet P. Boldizar, *Gender Segregation in Higher Education: Effects of Aspirations, Mathematics Achievement, and Income*, 63 Soc. Educ. 62, 68 (Jan. 1990).

[16] American Council on Education, *Minorities in Higher Education 1994, 13th Annual Report* 78 (Table 14) (Mar. 1995).

[17] *Digest of Education Statistics, supra* note 15 at 252 (Table 239).

[18] *Id.* at 255 (Table 239).

even though the absolute number of women entering traditionally male-dominated fields has increased, the rate of growth appears to be slowing.[19]

The historical exclusion of women from these male-dominated fields of study, coupled with the overall discrimination women have encountered in education, also has resulted in the denial of access to critical financial assistance for higher education opportunities.[20] For example, one court has held that use of Scholastic Assessment Test ("SAT") scores, which typically are higher for boys than for girls, particularly in math,[21] as the sole determinant of state scholarship awards violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Sharif v. N.Y. State Educ. Dept.*, 709 F. Supp. 364 (S.D.N.Y. 1989).[22]

Women also are denied access to an entire class of scholarships designated specifically for men, created with

---

[19] American Council on Education, *Increase of Women Majoring in Nontraditional Fields Slows Dramatically*, About Women on Campus, Fall 1994, at 11 (study conducted by University of Pennsylvania sociologist, Jerry A. Jacobs).

[20] This discrimination continues to exist despite the passage of Title IX in 1972. *See* 20 U.S.C. §§ 1681-1688 (prohibiting discrimination on the basis of sex "under any educational program or activity receiving Federal financial assistance" with certain exceptions).

[21] Mary Moran, *Student Financial Aid and Women: Equity Dilemma?* 17 (Jonathan D. Fife ed. 1986).

[22] Indeed, the use of standardized tests to determine allocation of educational benefits and scholarships has been challenged by scholars, *see, e.g.*, Katherine Conner & Ellen Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 Berkeley Women's L.J. 13 (1992), and recently at the Office of Civil Rights ("OCR") for the Department of Education, where the American Civil Liberties Union filed a complaint in February 1994 concerning the use of the Preliminary Scholastic Assessment Test ("PSAT") to determine scholarship eligibility. To date, OCR has not issued a finding in that case.

no remedial purpose whatsoever. Specifically, Title IX regulations permit scholarship programs

> established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

34 C.F.R. § 106.37(b).[23] Thus, colleges and universities across this nation have provided scholarships and fellowships for "deserving" men planning to pursue careers in medicine,[24] male mechanical engineering students who are members of the Sigma Chi Fraternity,[25] men from New Jersey,[26] and men who attended certain high schools,[27] among others.[28] As this illustrative list demonstrates, not only do these targeted scholarships fail to evince a compensatory purpose, in some cases they encourage and facilitate male participation in fields where

---

[23] Surely, it would be unacceptable for the court of appeals decision, if permitted to stand, to allow the anomalous circumstance in which gender-based scholarships established to remedy past discrimination would be unlawful, while gender-specific scholarships created for men with no compensatory purpose would be permitted.

[24] George Groff and Margaret Groff Scholarship offered by Bucknell University.

[25] Lewis Frederick Lyne Jr., Mechanical Engineering Scholarship, offered by Bucknell University.

[26] The New Jersey Student Aid Fund, offered by Middlebury College.

[27] The Duncan School Memorial Scholarship, offered by Vanderbilt University.

[28] The University of Maryland also offers male residents of Baltimore City or Charles County financial aid through the Vivian F. Roby Fund.

men already have an advantage, such as science and engineering.

The continued disparate treatment of women and the lingering effects of discrimination in higher education that persist to this day warrant special attention on the part of school and government officials.

III. AN EXTENSIVE NETWORK OF GENDER-BASED PROGRAMS HAS BEEN ESTABLISHED TO ERADICATE THE EFFECTS OF PAST DISCRIMINATORY PRACTICES AND PREJUDICES

To remedy the persistent effects of discrimination against women in higher education, federal, state, local, and private entities have created an extensive network of gender-based scholarships.[29] By targeting women for financial assistance, these scholarships serve to ameliorate some of the discrepancies in financial assistance that have been caused by past discrimination. Moreover, the majority of these scholarships provide funds specifically to support women interested in pursuing historically male-dominated fields, thus further addressing some of the most pernicious effects of prior discrimination. Under the ruling below, however, these scholarships could be jeopardized.

Scholarship opportunities for women range in scope from awards to encourage women to pursue careers in journalism[30] and helicopter piloting[31] to fostering interest in science and engineering.[32] At the federal level, the

---

[29] According to one source, well over 1,000 scholarships are primarily or exclusively targeted for women. Gayle Schlacter, *Directory of Financial Aids for Women 1995-1997* (1994).

[30] *Id.* at 36 (Helen Miller Malloch Scholarship).

[31] *Id.* at 116 (Doris Mullen Memorial Scholarship).

[32] *E.g., id.* at 81 (Undergraduate Award for Excellence in Chemistry; Women in Engineering and Computer and Information Science Fellow).

Department of Education earmarks funds to educational institutions to enable them to identify, recruit, and make available direct financial aid to talented undergraduate women and minorities. This program provides funds to approximately seventy institutions that award roughly 1,200 individual grants annually.[33]

Similarly, several state entities have created scholarships that are specifically designed to address the underrepresentation of women in science, engineering, and other traditionally male-dominated fields of study. The Florida National Science Scholars Program and the New York Governors Committee on Scholastic Achievement provide just two examples of affirmative measures that states have taken to remedy the current imbalance between men and women in the sciences.[34]

Individual colleges and universities have also established scholarships exclusively for women.[35] The University of Maryland itself, for example, maintains seven scholarship programs that provide funds to women only. For example, the Mary Elizabeth Roby Fund provides funds to senior or graduate women enrolled in government and politics. The University also sponsors the Summer Study in Engineering for High School Women and the WM Summer Engineering Program, both of which provide assistance to high school girls.[36]

---

[33] *Id.* at 88 (Women and Minority Participation in Graduate Education Grant).

[34] *Id.* at 30.

[35] Even when women are not the exclusive recipients of financial assistance, they are often given particular consideration by grant makers. For example, all of the National Institutes of Health recruitment programs require women and minorities to be given special consideration.

[36] Memorandum to the National Women's Law Center from the University of Maryland, Office of the President, *Listing of Gender-Based Scholarships awarded by UMCP.*

While targeted gender-based scholarships currently address the impact of past discrimination, the persistent disparity in the participation of women in certain fields underscores the continued necessity for these programs. By threatening the ability of educational institutions to develop and maintain programs aimed at eliminating the continued effects of historical discrimination, the decision of the court of appeals jeopardizes the continued viability of these important efforts and thus warrants the attention of this Court.

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petitions, the petitions for certiorari should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

MARCIA GREENBERGER
VERNA L. WILLIAMS
NATIONAL WOMEN'S LAW CENTER
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

DAVID H. COBURN
Counsel of Record
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae
National Women's Law Center, et al.

May 1, 1995

APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

National Women's Law Center

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law. The NWLC is interested in this case because the decision of the court of appeals threatens the broad array of financial assistance offered to thousands of women students nationwide as a means of redressing the effects of past discrimination in higher education. It is necessary that these programs exist because the elimination of the persistent effects of historical discrimination against women requires ameliorative measures.

American Association of University Women

The 150,000 members of the American Association of University Women ("AAUW") are women and men with baccalaureate or higher degrees who work on behalf of education and equity for all women and girls. AAUW favors affirmative action measures that open previously closed doors in education and in the work place to women and members of racial/ethnic minority groups. The AAUW Educational Foundation is the largest private source of fellowships to support women pursuing advanced degrees.

Association for Women in Science

Founded in 1971, the Association for Women in Science ("AWIS") is a nonprofit organization dedicated

to equity and full participation for women in all areas of science and technology. AWIS is interested in this case because the decision of the court of appeals threatens financial assistance for women and minorities which has helped redress past discriminatory practices and prejudices to equal access to higher education. Because of outright exclusion and other discriminatory practices, women are underrepresented today in fields of math, science, and engineering. To remedy these persistent effects of discrimination in higher education, an extensive network of gender-based scholarships has been implemented. AWIS believes that the decision of the court of appeals threatens the continued viability of efforts to provide equal access and promote equal opportunities for women interested in pursuing careers in science and technology.

Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

National Association of Commissions for Women

The National Association of Commissions for Women ("NACW") is interested in this case because the decision below threatens the broad array of financial assistance offered to thousands of women students nationwide as a means of redressing the effects of past discrimination. These programs are necessary because the elimination of the persistent effects of historical discrimination against women requires remedial measures.

National Clearinghouse on Women's Issues

The National Clearinghouse on Women's Issues ("CWI"), a non-profit organization, was established over

twenty years ago for the purpose of exchanging and disseminating educational information on issues related to discrimination on the basis of race, sex, age, or marital status, placing particular emphasis on public policies affecting the economic and educational status of women. To carry out its mandate, the CWI takes action or positions on issues central to the well-being of women.

The Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation is a § 501(c)(3) non-profit organization with offices in Arlington, Virginia, and Los Angeles, California. The Feminist Majority Foundation seeks to empower women through research, education, action, and other strategies that bring about women's equality.

The Feminist Majority Foundation believes that the Supreme Court of the United States should grant the petitions for writs of certiorari and further that the Supreme Court should overturn the decision of the U.S. Court of Appeals for the Fourth Circuit, erroneously holding that the University of Maryland at College Park ("UMCP") may not maintain a race-based scholarship program. The Feminist Majority Foundation believes that such programs are necessary to dismantle long-standing barriers to women's and minorities' equal educational opportunities.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, such as sex discrim-

ination in employment and education. NOW LDEF was co-counsel in *Garrett v. Board of Education* and has appeared as *amicus* in numerous cases concerning programs designed to insure girls' and women's equal participation in education.

National Organization for Women, Inc.

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of approximately 250,000 women and men in more than 600 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in education and the elimination of barriers that deny women educational opportunities and the ability to become economically self-sufficient. NOW believes that educational equality is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to insure full enforcement of laws prohibiting discrimination in education.

Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom has since 1915 worked for the achievement by peaceful means of those political, social, economic, and psychological conditions throughout the world which can assure peace, freedom, and justice for all. Ensuring access to education, through scholarship programs which redress the effects of past discrimination based on gender and race, is a necessary step towards creating those conditions. As such, the Women's International League for Peace and Freedom finds the *Podberesky* case of crucial importance.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense Fund ("WLDF") is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The Fund has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of the antidiscrimination laws. WLDF has devoted significant resources to combatting sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the Supreme Court to advance women's opportunities in education.

No. 94-1620, No. 94-1621

Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

MONICA GREENE, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, THE COLLEGE BOARD, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, LAW SCHOOL ADMISSION COUNCIL, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, IN SUPPORT OF PETITIONERS

Of Counsel:
SHELDON E. STEINBACH
General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, D.C. 20036
(202) 939-9355

MARTIN MICHAELSON *
DANIEL B. KOHRMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5748

* *Counsel of Record for Amici Curiae American Council on Education, et al.*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE COURT OF APPEALS DISREGARDED AMPLE EVIDENCE THAT MINORITY-TARGETED FINANCIAL AID PROGRAMS LIKE THE BANNEKER SCHOLARSHIPS ARE SMALL, UNIQUELY EFFECTIVE, AND TAILORED TO THE EDUCATIONAL NEEDS OF COLLEGES AND UNIVERSITIES THAT SPONSOR THEM, AND THUS ARE A MINIMALLY INTRUSIVE, VOLUNTARY MEANS TO LAWFUL ENDS	6
II. THE LEGAL STANDARDS EMBRACED BY THE COURT OF APPEALS WOULD RENDER IMPRACTICAL MANY GOOD FAITH EFFORTS, SUCH AS THE BANNEKER SCHOLARSHIPS, TO REMEDY VOLUNTARILY PAST DISCRIMINATION IN HIGHER EDUCATION	12
III. THE COURT OF APPEALS' IMPLICIT REJECTION OF DIVERSITY AS A LAWFUL RATIONALE FOR MINORITY-TARGETED FINANCIAL AID PROGRAMS WAS UNFOUNDED IN LAW OR FACT AND SHOULD BE VACATED	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

City of Richmond v. J.A Croson Co., 488 U.S. 469 (1989) 11, 12, 18
Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) .. 10
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 18
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 11, 16-18
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 18
United States v. Paradise, 480 U.S. 149 (1987) 15, 18
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11, 12, 18

Constitutional, Statutory, and Regulatory Provisions

U.S. Const. amend. I 18
U.S. Const. amend. XIV 16
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d 10
Notice of Final Policy Guidance, 59 Fed. Reg. 8756 (February 23, 1994) 13, 19

Legislative Authorities

Department of Education's Race-Specific Scholarship Policy: Hearings before the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives, 102d Cong., 1st Sess. (1991) 8
H.R. Rep. No. 102-411, 102d Cong., 1st Sess. (1991) 13

Other Authorities

Bowen, William G., and Rudenstine, Neil L., *Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups*, The Chronicle of Higher Education, January 9, 1991 9
Carter, Deborah J., and Wilson, Reginald, *Minorities in Higher Education, 1994 Thirteenth Annual Status Report* (American Council on Education 1995) 19

TABLE OF AUTHORITIES—Continued

Page

Letter from Robert H. Atwell, President, American Council on Education, to The Honorable Lamar Alexander, U.S. Secretary of Education (May 2, 1991) (transmitting report entitled *Minority-Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs*) 7, 8,10

Human Resources Division, U.S. Government Accounting Office, *Higher Education, Information on Minority-Targeted Scholarships* (1994) (GAO/HEHS-94-77) 7, 9-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620, No. 94-1621

WILLIAM E. KIRWAN, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

MONICA GREENE, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, *ET AL.*, IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The *amici* are national organizations that represent public and independent higher education institutions. They share a vital interest in legal standards applicable to race-conscious programs in higher education, as well as a strong commitment to increasing the participation of minority students in American colleges and universities, including

---

[1] This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

where opportunities for such students historically have been limited. *Amici* also strongly favor greater minority student participation in higher education to secure the educational benefits of diversity.

Amicus American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education on a nationwide basis. Its members consist of approximately 1700 institutions, including a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of higher education, including the interests of component groups of the academic community: students, faculty, administration, and employees. Many of ACE's members either have or are considering minority-targeted financial aid programs, among other measures, to assure effective recruitment and retention of minority students. The other *amici* on this brief [2] collectively represent a very broad range of interests of the American higher education community.

---

[2] In addition to ACE, *amici* are the American Association of State Colleges and Universities (represents more than 370 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands); American Association of Dental Schools (represents all United States dental schools, and affiliated institutions); Association of American Law Schools (legal education's principal representative to the federal government and to other national higher education organizations and learned societies); Association of American Medical Colleges (composed of 126 medical schools, 405 teaching hospitals, 92 academic societies, and related organizations); Association of American Universities (56 public and independent American, and two Canadian, universities with strong programs of graduate and professional education and research); Association of Community College Trustees (represents governing boards of the more than 1300 community colleges throughout the United States and Canada); Association of Governing Boards of Universities and Colleges (represents 30,000 member trustees, presidents, and chancellors who serve 1700 public and independent colleges and universities); The College Board (association of nearly 3000 education organizations that focuses on facilitating the transition of students from school to college); Council

Amicus ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, which was co-chaired by former Presidents Gerald Ford and Jimmy Carter, and which issued a report in May 1988 that outlined strategies for improving rates of minority matriculation, retention, and graduation. ACE and other *amici* also have gathered data for and submitted extensive comments to the U.S. Department of Education in connection with the Department's review of policies and practices concerning minority-targeted financial aid programs. ACE participated as an *amicus curiae* in both rounds of proceedings below.

The decision striking down the Benjamin Banneker Scholarship Program at the University of Maryland at College Park ("UMCP") is of great concern to *amici* because it is inconsistent with their policies and goals favoring increased participation of minority students in higher education. Moreover, the Court of Appeals decision conflicts with prior rulings of this Court and other federal authorities, and thus creates great uncertainty for *amici's*

---

for Advancement and Support of Education (represents approximately 2900 colleges and universities); Law School Admission Council (organization of 193 law schools in the United States and Canada; primary service is the Law School Admission Test); National Association for Equal Opportunity in Higher Education (association of 117 historically and predominately Black colleges); National Association of College and University Business Officers (represents over 2100 colleges and universities; promotes the sound management and financial administration of higher education institutions); National Association of Independent Colleges and Universities (represents over 840 private colleges and universities on public policy issues before the legislative, executive, and regulatory branches of the federal government); National Association of State Universities and Land-Grant Colleges (works to support the contributions that state and land-grant universities make through teaching, research, and public service/extension); National Association of Student Financial Aid Administrators (composed of more than 3000 postsecondary institutions as well as individuals and organizations concerned with student financial aid); and the National Association of Student Personnel Administrators (serves 5000 chief student affairs officers of higher education institutions).

member institutions. Finally, *amici* are concerned that by entering judgment for respondent without addressing petitioners' claim that the Banneker program is justified as a measure to secure student diversity, the Court of Appeals failed to credit sound legal precedent and established educational practice. *Amici* believe that sensitivity to these considerations is imperative, for the promotion of student diversity is a principled and educationally necessary objective that underlies minority-targeted aid programs operated by colleges and universities throughout the United States.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance regarding the efforts of American colleges and universities to redress the nation's legacy of discrimination and unequal participation in higher education, on account of race. The Court of Appeals decision striking down the Banneker Scholarships is flawed because of its narrow and inaccurate view of such minority scholarship programs. That view is inconsistent with the record as well as the experience of American colleges and universities, decisions of this Court, and longstanding federal government policies. Moreover, the Court of Appeals erred by summarily precluding the University of Maryland from defending the Banneker Scholarships based on their contribution to student diversity, a principled and educationally necessary goal well founded in this Court's decisions. Accordingly, the Petitions of William E. Kirwan, *et al.*, and Monica Greene, *et al.*, should be granted and the Court of Appeals decision should be reversed. Alternatively, the Court should grant a writ of *certiorari* to vacate the Court of Appeals Order, with instructions to remand this case to the district court for consideration of the diversity issue.

In ruling that the Banneker Scholarhips cannot withstand strict scrutiny, the Court of Appeals failed to consider evidence that minority-targeted financial aid pro-

grams, including UMCP's plan, are narrowly tailored remedies for lingering vestiges of past institutional discrimination. Proof in the record, recent empirical studies, and the experience of *amici* demonstrate that such programs are effective and often essential to enable colleges and universities to attract and retain minority students; are limited in scope and diffused in their impact on non-minority students, and thus are minimally intrusive means to increase minority participation in higher education; and are tailored to specific institutional circumstances that impede attraction and retention of minority students. The Banneker program thus is consistent with the Court's announced principles governing voluntary race-conscious public actions.

The Court of Appeals further misapplied the strict scrutiny standard by establishing novel and onerous requirements for colleges and universities. Its ruling would handcuff higher education institutions in their thoughtful and measured pursuit of the legitimate purposes served by minority scholarships. If allowed to stand, the ruling may deter UMCP and other colleges and universities from worthy and essential efforts to remedy past discrimination.

The Court of Appeals violated established legal principles by entering final judgment for respondent without examining the educational benefits of student diversity as an alternative basis for the Banneker Scholarships. The Court of Appeals rendered such a summary judgment *sub silentio*, declining to address UMCP's reliance on diversity or the arguments of *amici* on the diversity issue. Thus, neither lower court has expressly ruled on that issue. This clear error is another reason that the Court should grant *certiorari* and reverse the Court of Appeals ruling striking down the Banneker Scholarships. Alternatively, and in the event the Court elects not to reexamine the express rulings of the Court of Appeals, *amici* respectfully urge the Court to grant the writ for the limited purpose

of vacating the Court of Appeals judgment, with instructions to remand for district court consideration of the diversity issue.

ARGUMENT

I. THE COURT OF APPEALS DISREGARDED AMPLE EVIDENCE THAT MINORITY-TARGETED FINANCIAL AID PROGRAMS LIKE THE BANNEKER SCHOLARSHIPS ARE SMALL, UNIQUELY EFFECTIVE, AND TAILORED TO THE EDUCATIONAL NEEDS OF COLLEGES AND UNIVERSITIES THAT SPONSOR THEM, AND THUS ARE A MINIMALLY INTRUSIVE, VOLUNTARY MEANS TO LAWFUL ENDS.

Based on nationwide data, their members' experience, and record evidence regarding the Banneker Scholarships, *amici* believe that key features of "minority-targeted" [3] financial aid programs were wholly disregarded by the Court of Appeals in this case. Its ruling is consequently flawed and should be reversed.

An overwhelming consensus exists in the higher education community that minority-targeted aid programs such as the program at issue are effective, minimally intrusive means to assist higher education institutions to eradicate lingering effects of past discrimination and secure the educational benefits of racial and ethnic diversity. Moreover, most colleges and universities that employ minority scholarships consider them an essential component of their efforts to increase minority student participation in higher education. *Amici* respectfully urge the Court to take into account this national and historical perspective in deciding whether to examine the Court of

---

[3] *Amici* use the term "scholarship" herein as a synonym for "financial aid" and the term "minority-targeted" assistance to refer to financial aid for which membership in a particular historically underrepresented—*i.e.*, minority—group, or in one of several such groups, is a basis for eligibility.

Appeals' sweeping and in the view of *amici* misguided judgment that the Banneker Scholarships program is unlawful.

Recent empirical analyses of minority scholarship programs demonstrate clearly that such plans are widespread, effective, limited in size and scope, and highly varied in the criteria they apply and the specific goals they serve. Each of these factors weighs in favor of such programs, including the Banneker Scholarships, under applicable decisions of this Court.

The studies contain striking findings concerning the prevalence of minority-targeted financial aid programs. For instance, the United States Government Accounting Office found, based on a random-sample survey of 300 four-year undergraduate and graduate schools, that 64 percent of undergraduate schools and 72 percent of professional schools surveyed award at least some minority-targeted aid.[4] A report prepared by ACE in 1991 that summarized data from two other studies of minority-targeted aid programs related similar results: more than 80 percent of institutions surveyed (89 percent in one study, 83 percent in the other) have aid programs for which minority status was a criterion.[5]

---

[4] Human Resources Division, U.S. Government Accounting Office, *Higher Education, Information on Minority-Targeted Scholarships* (1994) (GAO/HEHS-94-77) ("GAO Study"), at 57 (Table III.2); *see also* Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br."), Addendum ("Add."), at 1. The comparable figure for graduate schools is 32 percent. *Id.*

[5] Letter from Robert H. Atwell, President, American Council on Education, to The Honorable Lamar Alexander, U.S. Secretary of Education (May 2, 1991) (transmitting report entitled *Minority-Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs*) (summarizing data collected by the National Institute of Independent Colleges and Universities and the American Association of State Colleges and Universities) ("ACE Compilation"), at 7 (Table 1).

Higher education institutions have embraced targeted aid to minority students "as an essential strategy" to remedy past discrimination and attain the educational benefits of student diversity.[6] Pursuit of these goals is considered fundamental to providing a first-class program of higher education.[7] Higher education leaders' commitment to these goals is matched by their testimony to the importance and effectiveness of minority scholarship programs in achieving these objectives. In 1991, ACE reported that 63 percent of college administrators surveyed agreed that minority-targeted financial aid programs were "very important to [their] ability to attract and retain minority students."[8]

By contrast, prominent American educators have spoken out regarding the relative ineffectiveness of race-neutral financial aid strategies for increasing participation of minority students. As the former President of Princeton University and the current President of Harvard University have written, "the targeting of financial aid [to minority students] has obvious advantages: [g]reater visibility and clarity are achieved, a stronger 'signal' [of welcome] is sent, and available funds can be invested with

---

[6] *See Department of Education's Race-Specific Scholarship Policy: Hearings Before the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives*, 102d Cong., 1st Sess. 61 (1991) ("Hearings") (statement of Donald M. Stewart, President, The College Board).

[7] *See, e.g.*, App. 213a-216a (UMCP April 26, 1993 Decision and Report, discussion of Danforth, Hackney, and Shalala affidavits).

[8] ACE Compilation 1. *See* Hearings 39 (Statement of Richard Rosser, Ph.D., President, National Association of Independent Colleges and Universities) ("We had to have minority scholarships to get students to DePauw University. This is true, I would guess, of the majority of our private colleges and universities—which historically, of course, were essentially white institutions. We had to reach out and indicate to minorities that they really were wanted").

maximum likelihood that they will achieve their true purpose." [9]

The record evidence is strong that the Banneker program is effective and that UMCP needs minority-targeted aid in order to attract and retain high-achieving minority students. (App. 194a-210a). Among the significant benefits of the program in the view of *amici* is its contribution to redressing racial stereotypes regarding minority student achievement. For instance, Banneker scholars "have a higher concentration in . . . science and technical majors . . . traditionally . . . less accessible to African Americans." (App. 196a.)

Although widespread, minority scholarship plans are limited in size. For example, the GAO reported that such programs account for only five percent of individual financial aid awards, and four percent of financial aid funds at the undergraduate level.[10] At the graduate level, such programs account for approximately three percent of individual aid awards, and five percent of total aid dollars.[11] The percentage of students in the surveyed institutions who receive minority-targeted aid is still smaller—no more than one percent at the undergraduate and graduate levels, and no more than four

---

[9] Bowen, William G., and Rudenstine, Neil L., *Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups*, The Chronicle of Higher Education, January 9, 1991, at B3.

[10] *See* GAO Study 58 (Table III.4); Podberesky II ACE Am. Cur. Br. Add. 2.

[11] *Id.* The proportion of minority-targeted aid is somewhat higher at professional (medical, law, and dental) schools surveyed by GAO (10 percent of all awards and 14 percent of all funds). *Id.* These results are consistent with the experience of such schools that it is extremely difficult to attract and retain minority students in significant numbers.

percent at the professional level.[12] Even the proportion of minority students receiving targeted aid is limited. Approximately seven percent of minority undergraduates, four percent of minority graduate students, and fifteen percent of minority students in professional school, receive such aid. *Id.*

The 1991 ACE study reached similar conclusions. Less than one percent of students in the surveyed institutions received minority-targeted aid. Between three and four percent of minority students received such aid. The programs represented no more than 2.5 percent of total aid funds at the institutions.[13]

It is thus clear that minority-targeted aid programs generally have no more than a *de minimus* impact on students otherwise qualified for financial aid who are ineligible for minority-targeted aid. These current practices of American colleges and universities pose no appreciable risk of harm to non-minority students' access to higher education.

The Banneker Scholarships, which account for only one percent of total available student aid at UMCP, are modest in scope and minimally intrusive. (App. 87a.)[14] Accordingly, *amici* agree with petitioners that respondent Podberesky failed to show that he suffered any significant injury as a result of the Banneker program.

A feature of minority-targeted aid programs is their great variety, based on distinctive institutional needs. Although most such programs are designed to reach students in racial or ethnic minority groups, the pre-

---

[12] *Id.* at 66 (Table III.10); Podberesky II ACE Am. Cur. Br. Add. 3.

[13] ACE Compilation 7 (Table 1).

[14] *Compare Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (allocation of 60 percent of institutional aid for minority or disadvantaged students in first year class violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d).

cise features and criteria of the programs vary greatly. For instance, the GAO identified, in its sample of colleges and universities, aid programs targeted to religion-, gender-, age-, national origin- and disability-based minority groups.[15] The GAO also discovered, upon in-depth examination of six institutions that offer minority-targeted aid, that the programs differed substantially based on such factors as the extent of the university's reputation as an inhospitable place for minority students to obtain an education, the extent of the institution's past success in recruiting and retaining minority students, the incidence of minority faculty on campus, the extent of the minority population in the state or region in which the institution is located, and additional factors affecting the success of recruitment and retention strategies other than minority-targeted aid.[16]

The data and views summarized above support petitioners' contentions that the challenged program is lawful under the Court's decisions governing voluntary race-conscious actions, including *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), as well as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). That is, these facts strongly suggest that UMCP's program is not an arbitrary set-aside, that the Banneker Scholarships are minimally intrusive with respect to students ineligible for such aid, and that alternative programs are inadequate to attract and retain substantial numbers of high-achieving African-American students who will help UMCP to overcome its legacy of segregation.

The Court of Appeals evidently gave no meaningful consideration to these matters. This Court should grant

---

[15] GAO Study 60 (Table III.6).

[16] *Id.*, Appendix IV ("Case Studies of the Use of Minority-Targeted Scholarships at Six Schools").

the writ to ensure that an issue of great national importance, and vital to colleges and universities throughout the country, is decided in light of the record and the experience of the higher education community.

II. THE LEGAL STANDARDS EMBRACED BY THE COURT OF APPEALS WOULD RENDER IMPRACTICAL MANY GOOD FAITH EFFORTS, SUCH AS THE BANNEKER SCHOLARSHIPS, TO REMEDY VOLUNTARILY PAST DISCRIMINATION IN HIGHER EDUCATION.

Amici respectfully urge the Court to review the Court of Appeals decision because of the uncertainty, alarm, and confusion it has sown among colleges and universities regarding the legality of minority scholarship programs. The Court of Appeals, by deviating from precedent and applying harsh new constraints to the autonomy of higher education institutions, generated deep concern and confusion among the membership of *amici*, including institutions that already have minority-targeted financial aid programs and others that contemplate establishment of such programs.

Among the concerns expressed by *amici's* member institutions regarding the legal standards embraced by the Court of Appeals are the following. First, many higher education institutions are distressed because, as petitioners have articulated in their papers, the Court of Appeals analysis of the present effects of past discrimination found by the district court appears to conflict with this Court's rulings. These include decisions regarding the legal standards applicable to voluntary race-conscious actions by public bodies, *see Croson, supra; Wygant, supra,* and the Court's decisions regarding the obligations of public schools to eliminate vestiges of past discrimination.[17] Second, many colleges and uni-

---

[17] *See* Petition No. 94-1620, Section I; Petition No. 94-1621, Section I.

versities are confounded by the disparity between the Court of Appeals decision and the recent U.S. Department of Education Final Policy Guidance regarding minority-targeted financial aid programs, as well as the long-standing position of the federal government with respect to such programs. *See* Notice of Final Policy Guidance, 59 Fed. Reg. 8756 (February 23, 1994).[18]

The Court of Appeals decision establishes a test for "strict scrutiny" virtually impossible for many colleges and universities to satisfy. The Court of Appeals legal analysis would impose onerous and novel requirements on members of the *amici* that are committed to taking steps, within appropriate legal bounds, to increase minority students' participation in higher education. Thus, a consequence of allowing the Court of Appeals ruling to stand would be to discourage and in many respects to render infeasible good faith, voluntary steps by colleges and universities to remedy lingering effects of past discrimination on their campuses.[19]

The Court of Appeals failed to acknowledge UMCP's very extensive documentation and articulation of the dual

---

[18] *See* Petition No. 94-1620, Section II. Another source of concern regarding the conflict between the Court of Appeals decision and the Final Policy Guidance derives from the twists and turns of the federal government in reviewing its long-standing policy on minority-targeted financial aid. After several years of uncertainty during which it appeared that the government might alter its approval of narrowly tailored minority-targeted aid programs, the Final Policy Guidance purported to resolve the uncertainty by ratifying and elaborating federal policy. *See* H.R. Rep. No. 102-411, 102d Cong., 1st Sess. 7-8 (1991) (noting rulings by federal officials in the early 1980s approving minority-targeted aid programs).

[19] That result is particularly unfortunate where, as here, the institution is part of a formerly dual system of public higher education, and thus has an affirmative duty to combat vestiges of segregation. *See* Petition No. 94-1621, at 18-21; Petition No. 94-1620, at 15, 25-26.

rationale underlying the Banneker Scholarships. UMCP commissioned expert studies, obtained sworn testimony, and issued a 61-page Decision and Report concerning the questions the Court of Appeals posed in its January 1992 remand order: Do present effects of past segregation exist at UMCP justifying the Banneker program, and if so, what are those effects? The Court of Appeals decision conveys a skewed impression of the record in this respect. Rather than relate the facts concerning UMCP's Decision and Report that the district court addressed, the Court of Appeals merely noted that "[t]he district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed." (App. 5a.) The implication, that UMCP's effort amounted to no more than routine discovery, fails to depict what happened. The district court more accurately described the record, noting the "strong" evidence produced by UMCP of present effects of past discrimination (App. 51a), as well as UMCP officials' "moral courage" in "engag[ing] in extended self-criticism." [20] *Amici* are concerned that if the University's very extensive evidence is adjudged so lacking in value, the law will be thought to impose an insuperable burden of proof. As a result, the law will give little incentive for other institutions—even those with pronounced lingering effects of past discrimination and small minority student populations—to acknowledge a need for narrowly tailored race-conscious remedial measures.

The Court of Appeals required UMCP to satisfy numerous other specific requirements supposedly linked to a fair inquiry into whether the Banneker program is nar-

---

[20] App. 51a n.47: "It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor."

rowly tailored. A few of these will demonstrate the onerous and novel quality of the Court's interpretation of the "strict scrutiny" test.

In treating the important topic of race-neutral alternatives, the Court of Appeals nowhere addressed one of petitioners' key claims in support of the Banneker program, that aid programs in which race is considered as one of many factors (or not at all), rather than as an eligibility criterion, are ineffective to increase minority recruitment and retention. (App. 26a-28a, 82a-84a.) The Court of Appeals merely stated, erroneously, that "the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem." (App. 27a.) The Court of Appeals also criticized UMCP for failing to try several supposed alternatives to financial aid, without identifying any record evidence that such measures are feasible or even race-neutral.[21] The approach of the Court of Appeals, to bypass extensive record evidence and propose alternative remedies that have no basis in evidence, was inconsistent with this Court's holding in *United States v. Paradise*, 480 U.S. 149, 171 (1987), that it is insufficient to posit race-neutral alternatives without establishing their efficacy relative to a challenged race-conscious program.

Petitioners identify other unwarranted aspects of the Court of Appeals decision. For example, petitioners note that the Court of Appeals erred in demanding that, to justify goals for ameliorating underrepresentation of minority students, UMCP would be required to "factor out . . . all nontrivial, non-race-based" explanations for dis-

---

[21] App. 26a (referring to additional "campus job opportunities" and "convenient, attractive, economically reasonable campus housing" for minority students). The exact nature of these supposed alternatives is quite vague. However, it appears, inexplicably, that the Court of Appeals faulted UMCP for not considering setting aside campus jobs or housing for minority students, while holding that UMCP may not allocate financial aid on that basis.

parities in minority and non-minority representation in the student body.[22] *Amici* agree with petitioners' analysis. Enforcement of such a requirement would tend to render minority scholarship programs impracticable. Most colleges and universities lack resources to conduct such elaborate analyses on a regular basis.[23]

The rigid approach the Court of Appeals employed in applying this Court's strict scrutiny requirement is inconsistent with the Court's admonition in *Bakke* that the Fourteenth Amendment must be enforced with due regard for "[t]he freedom of a university to make its own judgments as to education." 438 U.S. at 312. Unless the Court grants *certiorari* to correct this error, colleges and universities will be unsure whether they will next be subjected to similarly onerous requirements as a price for making modest and voluntary efforts to encourage minority presence on campus.

III. THE COURT OF APPEALS' IMPLICIT REJECTION OF DIVERSITY AS A LAWFUL RATIONALE FOR MINORITY-TARGETED FINANCIAL AID PROGRAMS WAS UNFOUNDED IN LAW OR FACT AND SHOULD BE VACATED.

ACE joined UMCP below in asserting that the Banneker Scholarships are justified as a narrowly tailored means to serve the lawful purpose of securing and main-

---

[22] *See* Petition No. 94-1620, at 21-23; Petition No. 94-1621, Section II.

[23] For related reasons having to do with the strongly-held view of colleges and universities that they should be entitled to conduct their own admissions processes—within appropriate legal limits, of course—*amici* also consider onerous the Court of Appeals' suggestion that the judiciary may hold the institutions to a formulaic determination of what their "effective minimum criteria" for admission are, notwithstanding the fact that institutional policy may establish a more flexible approach to admissions that will produce varied results from year to year. (App. 16a-18a.)

taining racial diversity within UMCP's student population. However, neither court in this case has to date squarely addressed the diversity issue. Notwithstanding that, and without explanation, the Court of Appeals implicitly rejected the diversity rationale in entering final judgment for respondent. The Court should grant *certiorari* to vacate that unfounded ruling, which concerns an issue of grave importance to many colleges and universities, including UMCP. If the Court sustains the ruling below that there are no lingering vestiges of past discrimination justifying the Banneker Scholarships, the Court should direct a remand to the district court for further proceedings on the diversity issue.

UMCP directly addressed the diversity issue on remand in the district court when UMCP relied on achieving student diversity as one of two grounds supporting its motion for summary judgment. (App. 157a, 213a-218a.) In its Decision and Report assessing whether there was a continuing basis for such a race-exclusive program, UMCP explained that its commitment to ethnic diversity is "integral" to its commitment to educational excellence. (App. 214a, 217a.) UMCP reasoned as the Court did in *Bakke* that "quality education takes place through wide exposure to the robust exchange of ideas," and that such interchange "is facilitated and enhanced when . . . students are brought together from various backgrounds and ethnic groups." (App. 214a-215a.)[24] The Banneker Program, UMCP concluded, was intended to address the "single greatest recruitment challenge" impeding attainment of student diversity. (App. 217a-218a.) Notwithstanding UMCP's articulation of its diversity rationale, the district court declined to address it.

As an *amicus curiae* opposing respondent's appeal of the 1993 district court ruling, ACE asked the Court of Appeals "to take into account the possibility that its analy-

---

[24] *See* 438 U.S. at 312-13.

sis of the Banneker Program" as a measure to remedy the present effects of past discrimination "may affect similar programs adopted to achieve campus diversity."[25] Like UMCP,[26] ACE sought to preserve the possibility of district court review of the diversity issue.[27] However, the Court of Appeals did not mention the diversity issue in entering judgment for respondent. (App. 30a.)

---

[25] Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br.") 2 n.2.

[26] *See* Petition No. 94-1620, at 29 (noting UMCP's specific request that the Court of Appeals remand for consideration of diversity if it reversed the district court ruling).

[27] To that end, ACE presented to the Court of Appeals three major arguments in favor of the Banneker Program, under the diversity rationale, that ACE also had made as an *amicus curiae* in earlier proceedings in this case. *See, e.g.*, Brief of *Amicus Curiae* American Council on Education in Support of Appellees' Petition for Rehearing and Suggestion for Rehearing In Banc (4th Cir. 1992) (No. 91-2577). First, ACE argued that the record demonstrated that the Banneker Scholarships are operated in a manner consistent with the Court's rulings in *Bakke*, *Croson*, *Wygant*, and *Paradise*, *supra*, because they are narrowly tailored to serve the institution's interest in student diversity. In particular, ACE argued that the Banneker Scholarships are far more effective than programs that are race-neutral or that consider race or ethnicity as only one of many factors, and are distinctly different from the "set-aside" or race-based layoff plans condemned in *Croson*, *Wygant and Bakke*, because the Banneker Scholarships impose at most "relatively light" and broadly "diffused" adverse effects on ineligible non-minority students. *See* Podberesky II ACE Am. Cur. Br. 3-8; *Wygant*, 476 U.S. at 282. Second, ACE asserted that an evaluation of the Banneker program under the strict scrutiny standard should give due regard to the important First Amendment academic freedom considerations summarized by Justice Powell in *Bakke*, *see* 438 U.S. at 311-14; *see also Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), which are implicated by university policies related to promotion of student body diversity. *See* Podberesky II ACE Am. Cur. Br. 9-11. Third, ACE argued that a thorough strict scrutiny analysis of the Banneker Program could not ignore the recent regulatory

Amici concur with petitioners that the Court of Appeals' entry of a final judgment in favor of respondent implicitly rejected contentions that the Banneker Scholarships are constitutionally justified as a means to achieve the educational benefits of diversity.[28] *Amici* are concerned that this action may be improperly interpreted to condemn diversity as the basis for a minority-targeted scholarship plan. Accordingly, *amici* join the petitioners in urging the Court to grant *certiorari* to rectify this error.

Substantial harm would result to petitioners, *amici*, their members, and others if the Court of Appeals' implicit rejection of the diversity rationale is allowed to stand. Petitioners will have been denied a fair opportunity to have their diversity claim considered. Petitioners and all future students and other present and future members of the UMCP community will be denied the educational benefits of diversity that might have been nurtured by the Banneker Scholarships. Colleges and universities throughout the nation, and especially those in the Fourth Circuit, will be chilled in their good faith efforts to achieve student diversity through minority scholarships. These consequences would be particularly adverse in light of recent data that show limited progress, and in some respects declines, in minority participation in higher education.[29]

---

pronouncement on the subject by the U.S. Department of Education. *Id.* at 11-12 (discussing Final Policy Guidance).

[28] *See* Petition of William E. Kirwan, *et al.*, No. 94-1620, at 29; Petition of Monica Greene, *et al.*, No. 94-1621, at 30 n.29.

[29] *See, e.g.*, Carter, Deborah J., and Wilson, Reginald, *Minorities in Higher Education, 1994 Thirteenth Annual Status Report* 2 (American Council on Education 1995) ("African American high school graduates have experienced little improvement in college participation since 1990"); *id.* at 3, 10-12 (noting increase, from 1990 to 1993, in gap between college participation by African American and white high school graduates).

Amici urge the Court to grant the writ to preserve UMCP's right to establish that its reliance on the diversity rationale is valid. Reversal of the Court of Appeals decision would accomplish that result. Alternatively, the Court should vacate the Court of Appeals judgment at least to the extent that the judgment implicitly resolves the diversity issue. Further, the Court should direct the Court of Appeals to remand this matter to the district court for adjudication of the merits of the diversity rationale.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and either reverse the decision below, or vacate the decision below and remand for further proceedings that entail consideration of promoting student diversity as a basis for the minority-targeted financial aid program at issue.

Respectfully submitted,

Of Counsel:
SHELDON E. STEINBACH
General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, D.C. 20036
(202) 939-9355

MARTIN MICHAELSON *
DANIEL B. KOHRMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5748

* *Counsel of Record for Amici Curiae American Council on Education, et al.*

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

Nos. 94-1620 and 94-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Institutions Listed on Inside Cover)

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036-1872
(202) 828-2135
Counsel of Record for the Institutions of Higher Education as Amici Curiae

May 1, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LIST OF INSTITUTIONS JOINING THIS BRIEF *

UNIVERSITY OF ARKANSAS
BAYLOR UNIVERSITY
GEORGETOWN UNIVERSITY
UNIVERSITY OF HAWAII
UNIVERSITY OF ILLINOIS
UNIVERSITY OF MICHIGAN
UNIVERSITY OF MISSOURI
UNIVERSITY OF MONTANA
UNIVERSITY OF NEW MEXICO
NORTHWESTERN UNIVERSITY
THE OHIO STATE UNIVERSITY
OREGON SYSTEM OF HIGHER EDUCATION
UNIVERSITY OF RHODE ISLAND
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY
UNIVERSITY OF TEXAS SYSTEM
TEXAS A&M UNIVERSITY SYSTEM
UNIVERSITY OF UTAH
VALPARAISO UNIVERSITY
WASHINGTON UNIVERSITY OF SAINT LOUIS
BOARD OF DIRECTORS, INDEPENDENT COLLEGES AND UNIVERSITIES OF TEXAS, INC.

UNIVERSITY OF ARIZONA COLLEGE OF LAW
NEW ENGLAND SCHOOL OF LAW
OHIO NORTHERN UNIVERSITY, CLAUDE W. PETTIT COLLEGE OF LAW
SOUTHWESTERN UNIVERSITY SCHOOL OF LAW
ST. MARY'S UNIVERSITY SCHOOL OF LAW
TEXAS TECH SCHOOL OF LAW
THURGOOD MARSHALL SCHOOL OF LAW AT TEXAS SOUTHERN UNIVERSITY
TOURO COLLEGE, JACOB D. FUCHSBERG LAW CENTER

---

* There are no parent or subsidiary companies within the meaning of Rule 29.1.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS	4
II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Brown v. *Board of Education*, 347 U.S. 483 (1954) 2

Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 5

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 5, 11

United States v. *Fordice*, 112 S. Ct. 2727 (1992) 5

Wygant v. *Jackson Board of Education*, 476 U.S. 267 (1986) 10, 11

STATUTES:

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988) 2, 5

Montana Code Ann. § 20-25-421(4)(a) (1993) 7

OTHER AUTHORITIES:

Montana Board of Regents Policy 940.13.d (1994) .. 7

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance (Dep't of Ed.), 56 Fed. Reg. 64548 (Dec. 10, 1991) 4

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice of final policy guidance (Dep't of Ed.), 59 Fed. Reg. 8756 (Feb. 23, 1994) 4, 5, 6

United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

No. 94-1621

MONICA GREENE *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

This brief is submitted on behalf of twenty-seven institutions of higher education—listed on the inside cover of this brief—that wish to support the granting of writs of certiorari so that the decision of the Fourth Circuit in

---

[1] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

this case may be reviewed by this Court.[2] Many of the institutions joining this brief have race-specific or minority-specific scholarship programs of their own. While these programs take many different forms and have been adopted by institutions with different circumstances and histories, they share a common characteristic: they have proven to be effective tools in attracting and retaining minority students.

Like the University of Maryland at College Park ("UMCP"), some of these institutions had a history of legal segregation before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and have been subject to proceedings and negotiations with the Office of Civil Rights of the Department of Education (and its predecessor) for many years after the passage of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, aimed at ensuring that the previously segregated system has been disestablished and the effects of prior discrimination eliminated. Some of these institutions—like UMCP—partly justify their race-specific scholarship programs as efforts to remedy past discrimination in response to enforcement proceedings instituted by the Office of Civil Rights in the past. The rejection by the Fourth Circuit of the "remediation justification" put forward by UMCP —in spite of the extensive evidence that the University assembled in support of its program—may jeopardize such programs at institutions that have been targeted by the Federal Government for enforcement proceedings under Title VI in the past.

Other institutions joining this brief do not have histories of segregation or believe that they have already

---

[2] The decisions in the lower courts appear at 764 F. Supp. 364 (D. Md. 1991) (App. 109a) (granting defendants' motions for summary judgment), 956 F.2d 52 (4th Cir. 1992) (App. 96a) (reversing and remanding), 838 F. Supp. 1075 (D. Md. 1993) (App. 34a) (granting defendants' motions for summary judgment), and 88 F.3d 147 (4th Cir. 1994) (App. 1a) (vacating and remanding with directions to grant plaintiff's motion for summary judgment).

remedied past discrimination. They justify their race-specific or minority-specific programs solely or principally as legitimate efforts to promote or achieve a diverse student body, or expect in the future to justify their programs on these grounds. Those institutions fear that the Fourth Circuit's ruling, including its cursory treatment of UMCP's contention that its scholarship program was justified in part on diversity grounds, also places in legal jeopardy their own scholarship programs.

Finally, other institutions do not have race-specific or minority-specific scholarship programs at the present time, but support the institutional and societal objectives served by such programs and wish to be free to adopt such programs in the future.

All of the institutions joining this brief are troubled by the implications and effects of the Fourth Circuit's decision and urge its consideration by this Court. Race-specific scholarships have been an essential weapon in the arsenal of techniques used by colleges and universities to attract minority students and to retain them once they are admitted. Today, when the number of qualified minority students enrolled at many institutions of higher education is declining, the need for carefully targeted minority financial aid remains as high as ever. The Fourth Circuit's decision fails to provide useful guidance for race-specific scholarship programs but instead virtually slams the door on such programs, sending an unmistakable warning both to the administrators of such programs and to students of all races. The effects of the decision could be devastating to the effort—barely more than a generation old—to increase the participation of minority students at American colleges and universities.

The petitioners have already briefed the facts of this case in detail and demonstrated the ways in which the Fourth Circuit's decision diverged from well-established law in this area. In addition, the petitions and the briefs of other *amici* demonstrate well the national importance

of this case. The institutions joining this brief support the petitions. In what follows, we highlight the importance of the case to institutions of higher education and some of the difficulties posed by the Fourth Circuit's decision.

ARGUMENT

I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS.

In 1991, in soliciting comments on proposed policy guidance on nondiscrimination in student financial aid, the Department of Education took note of evidence from the American Council on Education ("ACE") showing that "approximately 3.5 percent—about 45,000—of all minority students at four-year colleges receive 'race-exclusive scholarships', that is, scholarships for which students of only a designated race or national origin may compete." According to the ACE, "colleges most often offer race-exclusive scholarships in order to increase the diversity of their student populations." 56 Fed. Reg. 64548 (Dec. 10, 1991).

By the time the Department issued its final policy guidance in 1994, 59 Fed. Reg. 8756 (Feb. 23, 1994), the General Accounting Office had studied the matter and reported that 64 percent of all undergraduate schools, 32 percent of graduate schools, and 72 percent of all professional schools had one or more minority-targeted scholarships.[3]

---

[3] United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) at 59, Table III.2. The Report (at 1) defines "minority-targeted scholarships" as "scholarships for which some form of minority status is an eligibility requirement."

It is obvious from these figures that many institutions of higher education have found minority-specific scholarship programs necessary and appropriate to serve important educational and institutional values. For institutions that, like UMCP, have an acknowledged history of segregation, eliminating current effects of past discrimination is of course an appropriate goal—indeed one required by law. In determining whether states have discharged that obligation, this Court has consistently asked "whether existing racial identifiability is attributable to the State and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *United States* v. *Fordice*, 112 S. Ct. 2727, 2735 (1992). Many institutions, like UMCP, have decided that a limited number of race-specific scholarships appropriately advance that important goal without running afoul of the Fourteenth Amendment or Title VI. The Department of Education expressly recognizes the appropriateness of race-specific scholarships in achieving this goal, so long as there is a "strong basis in evidence" for concluding that the college's action is "necessary to remedy the effects of its past discrimination." 59 Fed. Reg. at 8757.

In addition, for institutions of higher education that have adopted race-specific or minority-specific programs —both those that have a history of past discrimination and those that do not—those programs serve the important goal of furthering the "attainment of a diverse student body," the goal identified in *Bakke* as "a constitutionally permissible goal for an institution of higher education." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.). See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990) ("a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated * * *").

Attainment of a diverse student body at a university serves important educational goals. As the Department of Education observed, many colleges "seek to create on campus an intellectual environment that reflects" the nation's own diversity, as "America * * * has forged one Nation from many people of a remarkable number of different backgrounds." 59 Fed. Reg. at 8757. Such a diverse intellectual environment benefits students of *all* races and backgrounds. The UMCP Decision and Report Regarding the Benjamin Banneker Scholarship Program (hereinafter the "Report"), reproduced in the Appendix to the petitions at pp. 139a-220a, not only states UMCP's commitment to a diverse student body to further its educational goals, but demonstrates that other institutions share that commitment, quoting affidavits in the record from Donna E. Shalala, then Chancellor of the University of Wisconsin-Madison and now Secretary of the Department of Health and Human Services (App. 213a-214a), William H. Danforth, Chancellor of Washington University (App. 215a-216a), and Sheldon Hackney, then President of the University of Pennsylvania and now Chair of the National Endowment for the Humanities (App. 215a, n.126). Ms. Shalala stated that her own university "cannot provide a quality education—that is, an education which will prepare students to live, work and provide leadership in the United States—without the active participation of and exposure to a diverse student body." App. 214a. Dr. Danforth said:

> "While *de jure* segregation is a thing of the past (albeit the recent past), the attitudes and stereotypes that accompanied legal segregation have not disappeared. Changes in beliefs and attitudes require time and education. We think it important that American institutions, in partnership with government, take active steps to make these institutions places where African Americans feel welcome and to continue the work of dismantling old ideologies and prejudices." App. 215a.

Such quotations could be multiplied endlessly, but we believe that the importance that institutions have long placed on a diverse student body is not a matter of serious dispute.

To attain desirable student diversity, many institutions —like UMCP—have decided that one appropriate tool is the race-specific or minority-specific scholarship. Dr. Danforth, in the affidavit just quoted, reported that the number of African Americans who applied to Washington University tripled after a scholarship program targeted at African Americans, and awarded to up to ten freshmen each year, was instituted in 1987.[4] UMCP adopted another form of such a program. Its Banneker Scholarship Program awards twenty to thirty full scholarships per year to high-achieving black students already selected for admission and encompasses about one percent of financial aid moneys available to UMCP students. Other institutions may target different groups—Asian Americans, Hispanics, Native Americans,[5] or other race or minority groups—and may have programs that are considerably more limited in number, covering only one or two students. Isolated instances of race-specific or minority-specific scholarships may arise at a university because committed graduates or other philanthropists may have contributed money in honor of a prominent graduate. Moreover, while UMCP decided to award its Banneker

---

[4] Affidavit of William H. Danforth, UMCP Decision and Report Exhibit 68, ¶¶ 8-12.

[5] For example, the State of Montana specifically authorizes the University of Montana system to waive tuition and fees for persons of one-fourth Indian blood in residency in the State. Montana Code Ann. § 20-25-421(4)(a) (1993). Pursuant to that authority, the Montana Board of Regents has required all public university campuses to give tuition and fee waivers to such persons when they meet financial need prerequisites. Montana Bd. of Regents Policy 940.13.d (1994). The University's main campus in Missoula has granted an average of 173 waivers annually over the past few years pursuant to this policy.

Scholarships regardless of need, other institutions continue to require a showing of need, even where particular scholarships are limited to members of particular groups.

With all the variations in the form of race-specific or minority-specific scholarships, and with all the variations in the histories and philosophies of the institutions that have adopted them, such programs typically provide a small percentage of the total scholarship money available to students and award money to a small percentage of the minority students at the institution.[6] These scholarships ordinarily and demonstrably supplement existing scholarship programs, rather than taking money away from existing programs. The money for the scholarships often has been donated for the specific purpose advanced by the particular scholarship, so that there is no good reason to believe that the money would nevertheless have been available had the institution refused to accept it as funding for a race-specific or minorty-specific scholarship. Thus, not only do these scholarships serve important institutional goals at the institutions that have adopted them, but they do so in a limited way that imposes little or no direct "burden" on ineligible students.

II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE.

Faced with a lawsuit challenging its race-specific scholarship program, UMCP undertook a careful review of the program and issued a 71-page Decision and Report with 69 exhibits. App. 139a-220a. That Decision and Report summarized the University's history of discrimination against African Americans; examined the available evidence that significant present effects of past discrimination continued to exist at the University, concluding that such effects do exist; pointed out the minimal effect of

[6] See GAO Report, *supra*, at 4-5 & 60, Table III.4.

the program on ineligible students; demonstrated that other programs to recruit and retain minority students have not been as successful as hoped, while the Banneker program has proved effective; and committed itself to review the need for the program every three years (see App. 212a). While that Decision and Report convinced the district court that UMCP's program was justified under this Court's decisions, the Fourth Circuit ruled the program unlawfully discriminatory in an opinion that gives little or no credit to the University's effort, rejects some justifications as a matter of law, and finds the Banneker Program "not narrowly tailored" to remedy past discrimination.

It is hard for the institutions of higher education that have a direct interest in these issues to read the Fourth Circuit's decision as signalling anything other than extreme judicial hostility to *any* race-specific or minority-specific scholarship program an institution might offer—no matter what justification and evidence the institution assembles in its defense and no matter how limited the program in relation to other financial aid offered by or through the institution. No institution of higher education that justifies its own race-specific or minority-specific scholarship program as a reasonable means to achieve diversity can rest easy if the Fourth Circuit's decision goes unreviewed and is taken as a guide by other Circuits. Several examples make the point.

First, the University's Decision and Report contained direct evidence of a causal connection between the vestigial effects of *de jure* segregation, the contemporary attitudes of African Americans towards UMCP, and the present effects of those attitudes on their willingness to attend UMCP. The district court found the evidence "overwhelming" that UMCP continues to have a poor reputation among African Americans, attributable to its past discrimination, and that this poor reputation affects recruitment of African-American students. 838 F. Supp.

at 1084-87 (App. 54a-62a). The Fourth Circuit, however, trivialized this record evidence with the remark that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (App. 10a). One can only wonder at this casual conflation of "mere knowledge of historical fact" with the specific cause-and-effect relationship that the University was offering evidence to establish and that the district court found to be established. This casual rejection of record evidence sends a dismaying signal to other institutions.

Second, the district court found that, by attracting "high-achieving black students" to the University, the Banneker Program "serves to enhance UMCP's reputation in the African-American community, increase the number of the African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." 838 F. Supp. at 1095 (App. 83a). In rejecting this justification, the Fourth Circuit found it relevant to say: "High achievers, whether African-American or not, are not the group against which the University discriminated in the past." 38 F.3d at 158 (App. 20a). Again, one can only wonder at this statement when the record is undisputed that the University had previously excluded *all* African Americans, regardless of the level of their achievement.

Third, while UMCP had justified its program in part on the ground that Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students —a justification the district court again found persuasive—the Fourth Circuit dismissed the contention on the ground that "[t]he Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we," citing *Wygant* v. *Jackson Board of Education,* 476 U.S. 267, 276 (1986) (plural-

ity opinion). 38 F.3d at 159 (App. 22a). *Wygant*, however, merely found that the school board's interest in providing minority role models for its minority students was insufficient to justify a lay-off program for teachers under which the percentage of minority teachers to be retained was tied to the percentage of minority students. That case cannot fairly be read as requiring the rejection of UMCP's role-model justification of the considerably narrower Banneker program—which grants financial aid to African Americans in numbers far below their representation at the University and which is merely one small part of the University's overall financial aid program.

Finally, having decided that the University's motion for summary judgment could not be granted because, in the Court's view, the program was not "narrowly tailored to remedy past discrimination," the Court failed to address UMCP's separate justification that the program was necessary to achieve the University's goal of a diverse student body and proceeded—on grounds that are difficult to decipher—to direct the district court to grant the plaintiff's motion for summary judgment. 38 F.3d at 161-62 (App. 28a-29a). Moreover, when the Fourth Circuit had discussed the diversity justification in its first decision in 1992, it had appeared to read *Bakke* as preventing a university from ever justifying a scholarship program limited to black students on the ground of achieving "genuine diversity." 956 F.2d at 56 n.4 (App. 103a n.4).

All agree that decisions of institutions of higher education to adopt race-specific or minority-specific scholarship programs are not immune from judicial review. Applicable precedent of this Court provides that there is a constitutional or statutory standard to be met. But the Fourth Circuit's decision goes far beyond that precedent in applying what it sees as the appropriate standard in such a way as to condemn almost any university's attempt to justify race-specific and minority-specific scholarship programs.

This Court should grant review of this case to ensure that the Fourth Circuit and other circuits do not, by the device of applying standards that cannot realistically be met, effectively outlaw race-specific and minority-specific scholarship programs.

CONCLUSION

For all of these reasons, as well as the reasons set forth in the petitions, this Court should grant the petitions for writ of certiorari.

Respectfully submitted,

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036-1872
(202) 828-2135
Counsel of Record for the Institutions of Higher Education as Amici Curiae

May 1, 1995

Nos. 94-1620 and 94-1621

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AND THE UNITED NEGRO COLLEGE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

(Additional Counsel Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

May 1, 1995

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION	4
REASONS FOR GRANTING THE PETITIONS	7
I. THE FOURTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD	7
II. THE PANEL'S APPLICATION OF THE WRONG LEGAL STANDARD, AND ITS FAILURE TO CONSIDER THE HISTORICAL CONTEXT WHEN EVALUATING THE FACTS, CAUSED ITS ANALYSIS TO BE WHOLLY INCONSISTENT WITH THIS COURT'S SCHOOL DESEGREGATION CASES	12
A. The Panel's Application Of The "Compelling Interest" Analysis Was Erroneous	12
B. The Panel's Application Of The "Narrow Tailoring" Analysis Also Was Erroneous	16
1. High-achieving African-American Students	17
2. Including Non-Residents Of Maryland	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Bazemore v. *Friday*, 478 U.S. 385 (1986) 16
Board of Educ. v. *Dowell*, 498 U.S. 237 (1991) 2
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 2, 4, 5, 8
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979) 10
Dayton Bd. of Educ. v. *Brinkman*, 443 U.S. 526 (1979) 7, 9, 10
Evans v. *Buchanan*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980) 15
Freeman v. *Pitts*, 112 S. Ct. 1430 (1992) 2, 7, 9, 10, 14
Green v. *County Sch. Bd.*, 391 U.S. 430 (1968) 7, 9
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 10, 14
Knight v. *Alabama*, 14 F.3d 1534 (11th Cir. 1994) 15
McLaurin v. *Oklahoma State Regents*, 339 U.S. 637 (1950) 15
Missouri v. *Jenkins*, 495 U.S. 33 (1990) 2
Morrow v. *Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) 14
North Carolina State Bd. of Educ. v. *Swann*, 402 U.S. 43 (1971) 10
Podberesky v. *Kirwan*, 38 F.3d 147 (4th Cir. 1994) ..... *passim*
Podberesky v. *Kirwan*, 838 F. Supp. 1075 (D. Md. 1993) 17, 18
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 10, 11
Sweatt v. *Painter*, 339 U.S. 629 (1950) 15
United States v. *Board of Sch. Comm'rs*, 506 F. Supp. 657 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) 14
United States v. *Fordice*, 112 S. Ct. 2727 (1992) ..... *passim*
United States v. *Paradise*, 480 U.S. 149 (1987) 12
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 4, 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1620 and 94-1621

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AND THE UNITED NEGRO COLLEGE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit organization established in 1963 at the request of the President of the

United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. The Lawyers' Committee has a long history of participation in school desegregation cases, see, *e.g.*, *Missouri* v. *Jenkins*, No. 93-1823; *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), and in cases addressing the principles of affirmative action, including *Adarand Constructors, Inc.* v. *Peña*, No. 93-1841; *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 467 (1989), and is concerned with the development of sound precedent regarding the means of eliminating the effects of discrimination.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Maryland is its statewide affiliate. The ACLU has been deeply involved in the effort to desegregate America's schools and to remove the vestiges of prior *de jure* segregation. As part of that ongoing effort, the ACLU served as counsel in *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992). The ACLU has also participated in most of this Court's cases concerning discrimination.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization with more than 500,000 members. Equal educational opportunity for minority group citizens, particularly African-American youth, has been one of the fundamental goals of the NAACP since its founding. As epitomized by its role in the landmark *Brown* decision, the NAACP historically has been a leader in litigating school desegregation cases at the elementary, secondary and college level, and related constitutional and civil rights issues in public education. Currently, the NAACP is a party in

numerous cases across the country which address issues of equality of opportunity and quality education in public school systems.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national nonprofit civil rights organization dedicated to promoting the rights of Hispanics in the United States in the areas of education, employment, immigration and political access. One of MALDEF's Education Program goals is to dismantle—through litigation and public policy advocacy—institutional discrimination that impedes Hispanic students' attainment of post-secondary educational degrees. MALDEF is particularly concerned about any cutback in or decreased commitment to affirmative action programs aimed at increasing the number of Hispanic students admitted to, retained in and graduated from post-secondary educational institutions. MALDEF has represented Hispanic students, immigrant students, and their parents in desegregation cases.

The Puerto Rican Legal Defense & Education Fund, Inc. ("PRLDEF") is a national civil rights organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF has been involved in many education cases involving the rights of Latinos to bilingual education, desegregated education and quality education. PRLDEF is concerned with recent efforts to reduce affirmative action in higher education. Currently, Latinos are 12% of the 18- to 24-year olds but less than 4% of the students attending four-year colleges. PRLDEF is interested in this case because it concerns the use of affirmative action in scholarships for minorities. It believes there should be more effort to provide these benefits to Latinos. However, it does not believe that the Banneker Program's targeting of African-Americans violates the rights of Latinos or others.

The United Negro College Fund ("UNCF") represents forty-one private, historically black colleges and univer-

sities located in Ohio and throughout the south and southwestern United States. UNCF institutions enroll fifty-five thousand predominantly African-American students, as well as international students and many white Americans. UNCF member institutions have always been, and continue to be, advocates for and practitioners of equal opportunity in higher education—employing faculty, staff and administrators from all racial, religious and ethnic backgrounds. While serving a primarily African-American student constituency, UNCF embraces and advocates on behalf of the interest of all minority students in higher education. Like historically black colleges and universities, minority and race-specific scholarships remain an essential tool for educating and training minority students for employment and productive citizenship in the twenty-first century.

INTRODUCTION

This case is of extraordinary national importance because it involves two fundamental civil rights issues that the Court has confronted in recent years: 1) the obligation of States with formerly segregated higher education systems to dismantle those systems; and 2) the circumstances in which States can implement affirmative action programs. The court below was asked to assess the propriety of a race-based scholarship program adopted by a State university as one element of a plan to dismantle a *de jure* segregated higher education system in response to uncontested findings of the United States Department of Education and the State of a continuing constitutional violation. The essential question presented in this case is whether the panel erred in applying the standard for reviewing voluntary, race-conscious affirmative action programs undertaken in the absence of a history of *de jure* segregation, set forth in *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), rather than the standards establishing the constitutional obligation effectively

to eliminate all vestiges of dual educational systems set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992), and this Court's school desegregation precedent.

The Fourth Circuit's decision conflicts with and ignores the legal standard applicable to a state university that adopts a race-based remedy to fulfill its constitutional duty to eliminate the vestiges of a prior *de jure* segregated system. In evaluating the Banneker scholarship program adopted by the University of Maryland at College Park ("the University" or "UMCP"), the panel erroneously relied upon this Court's decisions concerning the adoption of purely voluntary race-based policies in cases which did not involve any proven violations of law or any established history of official segregation and discrimination—*Croson*, 488 U.S. 469, and *Wygant*, 476 U.S. 267—and ignored this Court's decisions confirming that States have an affirmative obligation to remove all vestiges of *de jure* segregated school systems. Thus, the law of the Fourth Circuit is that *Croson* and *Wygant* have supplanted the large body of school desegregation jurisprudence from *Brown* to *Fordice*.

The question whether the Fourth Circuit correctly construed the Court's decisions is one of fundamental importance because the panel's holding directly will affect the rights of students, faculty and the public to have higher education systems dismantle dual systems and eliminate the effects of discrimination. Former *de jure* segregated systems have necessarily employed race-conscious remedies to dismantle dual systems of education. Likewise, voluntary action by school authorities is not only required, but is encouraged to avoid unnecessary judicial administration of educational systems. The decision below threatens the availability of relief necessary to dismantle dual systems and affirmatively discourages voluntary remedial action by school authorities to fulfill their obligation to dismantle *de jure* segregated systems. As a result, States in the Fourth Circuit will be reluctant to

take initiatives to eradicate the lingering effects of unlawful public education systems and students may be forced to seek relief in the federal courts. To avoid such a result, this Court should grant the petitions and provide the States and the lower courts with urgently needed guidance on the proper legal standard under which state remedial programs are to be reviewed by the courts.

To assist the Court in evaluating the parties' petitions, this brief will focus on two points. In Section I, the brief explains that the panel used the wrong legal standard in evaluating UMCP's Banneker scholarship program. Specifically, the panel erred in using the standard adopted in *Croson* and *Wygant* for purely voluntary affirmative action programs undertaken in the absence of any established record of *de jure* segregation, and failed to apply the long-standing standards imposed on prior *de jure* school systems that have not attained unitary status, namely that the school system is constitutionally compelled to take remedial action. A proper analysis would adhere to the standards and principles established by this Court's school desegregation cases.

In Section II, the brief discusses how the panel's application of the wrong legal standard, and its failure to consider the historical context, caused it to reach conclusions that are wholly at odds with the uncontested facts regarding Maryland's dual higher education system and irreconcilable with the holdings of the Court's key desegregation decisions. First, the panel's conclusion that the State did not have a "compelling interest" in taking remedial action conflicts with the acknowledged dual system and the undisputed findings of the State and the district court that the system has not been fully dismantled, and that the effects of the dual system persist. The panel simply ignored both fact and law in concluding that two of the State's proffered justifications for the remedial scholarship program—poor reputation and hostile campus climate for African-Americans—are irrelevant as a matter

of law. These effects consistently have been recognized in this Court's desegregation cases as vestiges of segregated systems that must affirmatively be remedied. Second, the panel's analysis under the "narrow tailoring" standard was equally erroneous. The appropriate standard must take into account the State's obligation to implement an effective remedial program that dismantles the dual system and eliminates the vestiges of discrimination. *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); *Fordice*, 112 S. Ct. at 2735; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979) ("*Dayton II*"); *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437 (1968).[1]

REASONS FOR GRANTING THE PETITIONS

I. THE FOURTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

One of the most striking things about the Fourth Circuit's opinion is that it makes virtually no reference to any of this Court's decisions establishing and confirming the States' long-standing obligation to take all action necessary to eliminate segregation and discrimination in public education. The Fourth Circuit reasoned that the fact that the defendant was a public university that had engaged for more than a century in notorious and egregious acts of discrimination was not relevant. From the panel's opinion, one would never know of the existence of the obligations imposed by *Brown* v. *Board of Education* and reaffirmed many times thereafter, most recently in *Fordice*, much less Maryland's shameful history of *de jure* segregation in all levels of education.

---

[1] *Amici* note that the second Question Presented in the separate Petition of William E. Kirwan, *et al.*—whether a State's interest in promoting diversity can be a constitutionally sufficient justification for remedial action—though raised, was not addressed by either court below. Therefore, to the extent that this Court does not reverse on the basis of the remedial justification, the appropriate disposition of this case is to vacate and remand for consideration of the State's alternate diversity rationale.

This fundamental shortcoming is traceable to the panel's erroneous conclusion that this Court's decisions in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), provide the correct legal standard for resolution of this case. *Croson* and *Wygant* both involved public entities that adopted affirmative action policies in areas where there was no established record or history of prior discrimination. In neither case were there any findings, either judicial or administrative, that the existing racial disparities in particular areas were traceable to past acts of discrimination by the public entities, let alone a prior system of state imposed *de jure* segregation. *Wygant*, 476 U.S. at 278 ("no such determination [of prior discrimination in hiring by school board] ever has been made"); *Croson*, 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry") (citations omitted). Using as its starting point precedent relevant to these different factual contexts, the Court concluded that the voluntary affirmative action programs could not withstand strict scrutiny because the public entities had neither demonstrated a compelling interest in implementing race-conscious remedial actions nor adopted remedies that were narrowly tailored to address prior discrimination.

Because *Croson* and *Wygant* presuppose no record of past *de jure* discrimination and no constitutional duty to dismantle an unlawful system, the panel erred in mechanically applying those decisions to a case where the state actor has a long history of discrimination and there are undisputed findings that the violation has not been cured. The panel failed to apply the long-standing and unequivocal obligations imposed on *de jure* public education systems by *Brown* and its progeny. That is, the panel ignored the existence of the historical system of segregated education and the State's affirmative duty to rem-

edy the constitutional violation, and instead analyzed the Banneker scholarships as a wholly voluntary program isolated from any past discrimination, like the programs in *Croson* and *Wygant*.

The panel's analysis is deficient and will lead to confusion because it displaces the standards and principles established by this Court's school desegregation decisions. These principles and standards control the legal analysis of race-conscious remedial programs undertaken by prior *de jure* school systems. First and foremost, the legal analysis must recognize that States that maintained *de jure* school segregation are under a continuing, affirmative duty to eradicate the *de jure* system and its lingering effects. "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present." *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); see also *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (school district has an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"); *Dayton II*, 443 U.S. 526, 538 (1979). This obligation applies to higher education systems as well as to primary and secondary systems. *Fordice*, 112 S. Ct. at 2735 (1992) ("Nor is there any dispute that [the affirmative obligation fully to dismantle dual systems] applies to [Mississippi's] higher education system").

Second, contrary to the panel's standard that presumed the illegality of the State's remedies, when a State has maintained a *de jure* school system, it is presumed that current racial imbalances are causally related to the prior segregation, and the party contesting the causal relationship bears the heavy burden of proving otherwise. See *id.* at 2741 ("*Brown* and its progeny . . . established that

the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system"); *Dayton II*, 443 U.S. at 537 (1979); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459-61 (1979); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 210 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); see also *Freeman*, 112 S. Ct. at 1447 ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation").

Third, race-conscious remedies typically are required to remedy racially discriminatory policies and conduct by the State. *Fordice*, 112 S. Ct. at 2736 ("We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system"); *Swann*, 402 U.S. at 25 ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations"); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy"). Thus, race-based policies must be evaluated in light of the state actor's affirmative duty to eliminate the effects of *de jure* discrimination and its record of pursuing other remedies. Given the State's *affirmative obligation* to take remedial action, courts must grant states latitude "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 15-16.

Pursuant to the desegregation precedent applicable to this case, the correct analysis is not that applied in *Croson* and *Wygant*, which did not involve any proven violations of law or an established history of official segregation and discrimination. Under this Court's de-

segregation cases, the onus is on former *de jure* school systems to identify and eradicate all vestiges of their prior systems, as well as to eliminate policies that could perpetuate the dual system or impede the attainment of unitary status. *Fordice*, 112 S. Ct. at 2735; *Dayton II*, 443 U.S. at 538. The ultimate measure of the State's compliance with its constitutional obligations "is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Id.* Accordingly, race-conscious remedies must be implemented if they are necessary "to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16.

The foregoing principles must be taken into account by courts that are evaluating the purpose and effectiveness of remedies adopted by school systems to eliminate vestiges of segregation. School authorities attempting to meet their constitutional obligation should be accorded deference in crafting remedies, particularly when previous remedies have proven unsuccessful. The dismantling of dual systems is a complex process that may involve some trial and error, but such systems are constitutionally mandated to keep searching for effective remedies until they have achieved unitary status, and must be given the flexibility to do so.

In sum, the panel's error was in ignoring the historical context in which UMCP adopted its race-conscious policies and the pronouncements of this Court with respect to prior *de jure* school systems. Those pronouncements make clear that such school systems are under affirmative obligations to take remedial action that distinguish them from state actors that adopt affirmative action policies on a purely voluntary basis outside the context of prior systemic segregation. The panel's failure to recognize this distinction leaves both courts and state actors without proper guidance as to the legal standards in this area.

II. THE PANEL'S APPLICATION OF THE WRONG LEGAL STANDARD, AND ITS FAILURE TO CONSIDER THE HISTORICAL CONTEXT WHEN EVALUATING THE FACTS, CAUSED ITS ANALYSIS TO BE WHOLLY INCONSISTENT WITH THIS COURT'S SCHOOL DESEGREGATION CASES.

The Fourth Circuit's opinion powerfully illustrates the anomalous and erroneous conclusions that can result from a mechanical application of *Croson* and *Wygant*, as opposed to the principles that undergird the school desegregation cases. If the opinion is allowed to stand, lower courts and state actors, particularly former *de jure* school systems, will face conflicting guidance as to the legal standards that govern judicial review of efforts to dismantle segregated school systems.

A. The Panel's Application Of The "Compelling Interest" Analysis Was Erroneous.

Although the panel ultimately held that there were material factual disputes on the "compelling interest" issue that could not be resolved without a trial, *Podberesky* v. *Kirwan*, 38 F.3d 147, 157 (4th Cir. 1994) (J.A. 18a), the panel's analysis contains fundamental legal errors that are the direct result of its failure to apply the correct legal standard and to consider the historical events that led to UMCP's adoption of the Banneker scholarship program. Indeed, the compelling interest standard effectively is inapposite to dual systems with an affirmative constitutional duty to desegregate. See *United States* v. *Paradise*, 480 U.S. 149, 167 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"). The affirmative duty to dismantle its unlawful system dictates that the State employ race-conscious remedies as necessary to disestablish dual systems and their effects.

The panel's analysis is devoid of any recognition of either the legacy of the dual system in Maryland or the

State's efforts to address the administrative findings of a continuing constitutional violation. In light of the history of segregated education in Maryland and the uncontested administrative findings, the existence of an affirmative duty to act in this case is clear. Only by viewing the State's proffered justifications in isolation from history and the applicable standards under the desegregation cases could the panel have concluded otherwise. Thus, the panel's opinion is irreconcilable with the Court's school desegregation decisions.

The panel's analysis contains three serious errors. *First*, when a State has maintained a *de jure* segregated school system, it is presumed that current racial imbalances or inequities are causally related to the prior segregation. See *supra* at 9-10. In this case, the State does not contest this presumption in relation to the four factors. Yet, to the extent that it viewed the University as carrying a burden to demonstrate that the present effects were causally related to its prior conduct, the panel's analysis directly conflicts with this standard.

Second, the panel's conclusion that UMCP's poor reputation in the African-American community and racial hostility on campus are irrelevant *as a matter of law* flies in the face of this Court's school desegregation decisions, which have recognized that "[i]n a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors." *Fordice*, 112 S. Ct. at 2736. Indeed, the panel's decision trivializes the impact upon real people, particularly young students, of the legacy of a dual system that this Court has held must be remedied. The record in this case establishes real and justified negative perceptions of the University by African-Americans as a result of over a century of *de jure* segregation and decades of resistance by the State to its constitutional duty to eradicate the dual education system.

With respect to UMCP's poor reputation in the African-American community, the panel dismissed this justification out of hand, concluding that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (J.A. 10a). Yet this Court and others consistently have recognized that poor community reputation is a significant vestige of discrimination and a direct result of state resistance to eliminating the legacy of segregation that must be remedied in the course of attaining a unitary system. See *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1446 (1992) (in determining whether a school system has been desegregated, courts must examine "whether the school district has demonstrated, to the public and to the parents and the students of the once disfavored race, its good faith commitment" to nondiscrimination); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973) (in determining whether a school is segregated, a court should examine "the community and administration attitudes toward the school"); *United States* v. *Board of Sch. Comm'rs*, 506 F. Supp. 657, 673 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (ordering school-community relations program as part of desegregation plan); see also *Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) ("The reputation of the [Mississippi Highway] Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices"; ordering additional recruitment measures "to insure that black applicants will be attracted to the force"). In short, the panel's conclusion that poor reputation is irrelevant *as a matter of law* simply cannot be squared with this Court's precedent and reveals a striking disregard of the real-world effects of *de jure* segregation and the difficulty of eradicating them.

The panel's conclusion with respect to the State's findings of a hostile climate is equally erroneous. The panel acknowledged that evidence in the record established the existence of racial incidents on the campus, but concluded that the hostile climate did "not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." 38 F.3d at 154 (J.A. 11a). Again, however, this Court has recognized that a racially hostile learning climate is often a consequence of past segregation and that it must be remedied in order for students of all races to be willing to attend previously single-race schools. See *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (mere admission is not enough to meet the mandates of the Fourteenth Amendment; a graduate student is still denied Equal Protection if the student is placed in a hostile environment which affects his "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession"); *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950) ("[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts"). Lower courts likewise have recognized that the effects of a hostile environment necessarily perpetuate the dual system and must be remedied. *Knight* v. *Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994); *Evans* v. *Buchanan*, 582 F.2d 750, 772 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980) (adopting human relations program to prevent racial myths and stereotyping). The panel's implausible conclusion that the proven campus problems at UMCP have no nexus to the prior segregation and cannot, as a matter of law, be affirmatively remedied, simply ignores this precedent.

Third, the panel's analysis of the State's reliance on the underrepresentation of African-American students at the University and lower graduation and retention rates

for these students further illustrates its wrongful application of *Croson* and *Wygant*. While the panel held that there are material issues of fact that should have precluded summary judgment on these issues, 38 F.3d at 156 (J.A. 18a), it again failed to apply the long-standing principle that where a school system formerly was segregated by law, current racial imbalances are *presumed* to be causally related to the prior *de jure* system, and a party disputing the causal relationship bears a heavy burden of proof. See *supra* at 9-10.

Instead, the panel not only effectively placed the burden of proof on the University, but required elimination of other potential causes, holding that "the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity." *Id.* at 160 (J.A. 24a). *By reversing* the presumption of causation established by this Court's school desegregation decisions, the panel was able to analyze the statistical evidence in a historical vacuum, thereby rendering the State's egregious history of segregation irrelevant and creating issues of fact where none exist. By heightening this burden of proof to extend to isolating and disproving any other potential causal factors, the panel further erred under *Bazemore* v. *Friday*, 478 U.S. 385 (1986).

B. The Panel's Application Of The "Narrow Tailoring" Analysis Also Was Erroneous.

The panel's application of the "narrow tailoring" analysis also reflects its failure to apply the correct legal standard. Because the panel did not correctly identify the appropriate objectives of remedial action—*e.g.*, to dismantle the remaining vestiges of segregation—its analysis of whether the State's remedies are "narrowly tailored" to these objectives is erroneous. By failing to appreciate the complex lingering effects of the prior dual education

system, the panel failed to understand why the Banneker scholarship program is in fact necessary to eradicate those effects.

1. *High-achieving African-American Students.*

Pursuing an erroneous analysis under the wrong standard, the panel concluded that the scholarship program is not "narrowly tailored" to its remedial goals of attracting and graduating more African-American students to the campus and curing the reputation and hostile climate problems because "[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past." *Id.* at 158 (J.A. 20a).

This stunning conclusion ignores Maryland's *de jure* history and the stated purposes of the scholarship program. Under Maryland's dual system, all African-Americans, including high-achieving African-American students, were excluded from the University. Indeed, the African-Americans excluded by the *de jure* system were those high-achieving students who, but for the racial qualification, satisfied the University's admissions criteria. Hence, the Banneker program focuses on enrolling the type of students that directly were excluded by the *de jure* system and is therefore designed to remedy the exclusion of past discrimination.

Furthermore, the ultimate purpose of the scholarship program is not just effectively to enroll high-achieving African-American students, but rather to make the University more attractive and hospitable to *all* African-American students. As the district court recognized, the Banneker program will break down racial stereotypes, establish a strong alumni base, and provide role models for all African-American students. *Podberesky* v. *Kirwan*, 838 F. Supp. 1075, 1094-95 (D. Md. 1993) (J.A. 82a-83a). In this way, the Banneker program contributes to the

elimination of all four of the identified vestiges of discrimination.

The panel's simplistic and erroneous analysis failed to recognize the scholarship program's broader purposes. More generally, the panel failed to appreciate that the legacy of state-sanctioned segregation is complex and that eliminating all of the effects is a difficult task calling for creative, long-term solutions. As the district court recognized, the University carefully considered alternative scholarship programs and adopted the Banneker program only after concluding that the alternatives "would not be nearly as effective in remedying the problems that continue to exist." *Id.* at 1095 (J.A. 83a). Indeed, the current version of the Banneker program was implemented only after the University tried a scholarship program that was open to all minority students, and found that the program was not successful in remedying the injury to African-American students. *Id.* at 1081 n.41 (J.A. 48a). Thus, the Banneker program is a good-faith effort by the State to implement an effective remedy to address the State's continuing constitutional violation. Only under the panel's misguided and contrived analysis could it be characterized otherwise.

2. *Including Non-Residents Of Maryland.*

The panel also concluded that the scholarship program is not "narrowly tailored" because it is open to non-Maryland residents. 38 F.3d at 158-59 (J.A. 20a-21a). Again, this conclusion is misguided and erroneous. Under the dual system, all African-American students, both residents and non-residents of Maryland, were excluded from the University. The four factors the State has identified as remnants of past discrimination that require remedial action apply equally to residents and non-residents. Thus, making scholarships available to non-residents is essential to remedy the injury incurred. Indeed, the scholarship program for African-American students is precisely tar-

geted at the group that formerly was excluded from the University.

Again, the panel's analysis was wrong, with the result that it struck down a program that had significant promise of bringing the State into compliance with the Constitution without significant impact on non-African American students.

* * * *

By ignoring nearly half a century of this Court's jurisprudence, the Fourth Circuit's decision below threatens to terminate the uncompleted and sorely needed efforts of former *de jure* segregated school systems to eradicate the effects of their prior conduct. This Court should grant the petitions and reaffirm the importance and centrality of the States' continuing affirmative obligation to remedy the vestiges of segregation.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

May 1, 1995

Supreme Court, U.S.
MAY 1 1995
OFFICE OF THE CLERK

Nos. 94-1620 and 94-1621

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN, PRESIDENT, UNIVERSITY OF MARYLAND AT COLLEGE PARK, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

MONICA GREENE, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
LESLIE A. SIMON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether respondent was entitled to summary judgment on his equal protection challenge to a merit-based scholarship program for black students established by the University of Maryland, College Park, to remedy the current effects of its past *de jure* racial segregation and other racially discriminatory practices.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Discussion	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Board of Education v. *Dowell*, 498 U.S. 237 (1991)	12
Brown v. *Board of Education*:	
347 U.S. 483 (1954)	4
349 U.S. 294 (1955)	12
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	14, 15, 17
Green v. *County School Board*, 391 U.S. 430 (1968)	12
Keyes v. *School District No. 1*, 413 U.S. 189 (1973)	12
Mandel v. *HEW*, 411 F. Supp. 542 (D. Md. 1976), aff'd by equally divided court *sub nom. Mayor of Baltimore* v. *Mathews*, 571 F.2d 1273 (4th Cir.), cert. denied, 439 U.S. 862 (1978)	5
McLaurin v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)	3
Plessy v. *Ferguson*, 163 U.S. 537 (1896)	3
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)	17
Sweatt v. *Painter*, 339 U.S. 629 (1950)	3
United States v. *Fordice*, 112 S. Ct. 2727 (1992)	7, 12, 13, 16
United States v. *Louisiana*, No. 80-3300 (E.D. La. Nov. 14, 1994)	18
Wygant v. *Jackson Board of Education*, 476 U.S. 267 (1986)	13, 14, 15, 19

Constitution, statutes and regulations: Page

U.S. Const. Amend. XIV 7
Equal Protection Clause 7
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 2, 4, 7, 11
42 U.S.C. 2000d-1 ..... 2, 17
34 C.F.R.:
Pt. 100 2
Section 100.3(b)(6)(i) 13, 17
Section 100.3(b)(6)(ii) 17
Section 100.5(h) 17

Miscellaneous:

56 Fed. Reg. 64,549 (1991) 17
Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756-8764 (1994) 3, 16
p. 8761 16
p. 8762 ..... 17, 19
Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-4272 (1994) 13
Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978) 13, 16

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN, PRESIDENT, UNIVERSITY OF MARYLAND AT COLLEGE PARK, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

No. 94-1621

MONICA GREENE, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the constitutional validity of the Benjamin Banneker Scholarship Program (Banneker program), a scholarship program established for black students by the University of Maryland, College Park (UMCP). The Banneker program was included in the system-wide desegregation plan submitted by the University to the United States Department of Education, Office for Civil Rights (OCR), in 1985 in an attempt to remedy the continuing effects of its past discrimination. The University once served as the all-white flagship institution in the Maryland

higher education system, a system that was segregated as a matter of law until the mid 1950s, and as a matter of practice until the late 1970s. The court of appeals ruled that the Banneker program was unconstitutional.

The United States Department of Education has primary responsibility for the administrative enforcement of civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance such as UMCP. OCR has played an active role since 1969 in federal efforts to eliminate the vestiges of Maryland's past lawfully mandated racial segregation in higher education.

The United States notified UMCP in 1969 that its higher education system remained segregated and that it had a legal responsibility to dismantle that segregated system. During the subsequent 16 years, OCR and the State of Maryland worked together, sometimes amicably and other times adversarily, to formulate a system-wide desegregation plan. The plan that was finally adopted in 1985 included efforts, like the Banneker program, to recruit students of other races to attend formerly all-black and all-white institutions. The United States participated in this case in the district court and the court of appeals as amicus curiae in support of the constitutionality of the Banneker scholarship program.

The United States Department of Justice is currently involved in litigation concerning desegregation of systems of higher education in Mississippi, Louisiana, and Alabama. Those cases arose upon referral from the Department of Education after the States refused to comply voluntarily with Title VI. See 42 U.S.C. 2000d-1. A recently entered consent decree in the Louisiana case contains provisions requiring the State to establish race-targeted scholarships as one means of meeting its obligation to desegregate its system of higher education. The Department of Education has long-standing regulations interpreting Title VI. See 34 C.F.R. Pt. 100. It also

recently issued a policy guidance on the application of Title VI to race-targeted student financial aid. See 59 Fed. Reg. 8756-8764 (1994). The United States has an interest in the availability of minority-targeted financial aid as one permissible means to remedy past unconstitutional discrimination by state colleges and universities; it also has an interest in the development of appropriate legal standards for evaluating such remedies.

STATEMENT

1. This case is a challenge to a scholarship program for black students at the University of Maryland, College Park (UMCP), that was part of UMCP's plan to eliminate the lasting vestiges of its past unconstitutional discrimination against blacks. UMCP has a long history of intentional racial discrimination. Throughout the first half of this century, UMCP was mandated by state law to be an all-white institution as part of the *de jure* racial segregation of the Maryland higher education system. Black students could attend only the four all-black colleges in the State, colleges that were "vastly underfunded and consistently neglected." Pet. App. 36a, 99a & n.3. When there was pressure to address the inequities of the racially segregated system in order to comply with the separate-but-equal rule of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), Maryland chose instead to pay for blacks to leave the State to attend graduate school rather than to integrate or equalize its own institutions. Interv. Summ. J. Mot. Exh. 5, at 93-95. In 1949, the President of UMCP recommended that UMCP be privatized rather than allow black graduate students to enroll there. Pet. App. 37a-38a.

After this Court ruled that graduate schools in two other States were required to admit blacks (see *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)), UMCP admitted its first black graduate student in 1951. Pet. App. 38a. University of Maryland officials,

however, did not vote to remove the legal bar to black enrollment until after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Pet. App. 38a. The racial segregation of the system continued for approximately 20 years thereafter. *Id.* at 11a. During this period, UMCP effectively excluded black students from the all-white school by establishing new and more stringent admission standards, requiring standardized testing, resisting dormitory integration, preserving the all-white character of UMCP by considering only other all-white schools for inclusion in an expansion plan, and by taking no steps to recruit black students or to integrate its campus. *Id.* at 38a-40a. In 1969, UMCP remained 99% white. *Id.* at 40a.

In 1968, the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (the predecessor of the Department of Education) began its efforts to compel Maryland to desegregate its higher education system. OCR found that the Maryland higher education system remained racially segregated and informed Maryland of its duty to dismantle the system in order to meet its obligations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 41a. During the course of the next several years, Maryland submitted desegregation plans that OCR rejected as ineffectual. Maryland continued to neglect black students, including failing to increase financial aid expenditures to meet needs of black students from low or moderate income families or to provide adequate housing for blacks, and demonstrated continued hostility toward recruitment of black students. *Id.* at 41a-44a. After OCR accepted a desegregation plan in 1974, Maryland "repeatedly failed to act in a manner which would indicate that it [was] executing the Plan promptly and vigorously." *Id.* at 45a.

OCR advised Maryland in 1975 that it was preparing to commence formal enforcement proceedings. In response, Maryland obtained an injunction ordering OCR to seek voluntary compliance before it initiated enforce-

ment proceedings. See Pet. App. 111a; *Mandel* v. *HEW*, 411 F. Supp. 542, 550 (D. Md. 1976), aff'd by equally divided court *sub nom. Mayor of Baltimore* v. *Mathews*, 571 F.2d 1273 (4th Cir.) (en banc), cert. denied, 439 U.S. 862 (1978). Ultimately, after years of negotiation and litigation during which the State continued to take actions that hindered desegregation (see Pet. App. 46a-47a), Maryland submitted a desegregation plan for 1980-1984. OCR found the plan inadequate, analyzed the deficiencies and provided guidance regarding the steps necessary to bring Maryland into full compliance with Title VI. *Id.* at 46a. OCR specified that Maryland needed to address the disparity between the black and white rates of admission at the traditionally all-white institutions, including UMCP.

Maryland submitted another plan for 1985-1989, one component of which was the provision of "other-race" financial aid at both traditionally white and traditionally black institutions to attract students of other races to those institutions and thereby reduce their continuing racial identifiability, a vestige of the *de jure* segregated system. Pet. App. 47a-49a. As required by OCR, UMCP submitted a separate institutional plan which included the Benjamin Banneker Scholarship Program as one of the means by which UMCP intended to reduce its racial identifiability as an all-white institution. *Id.* at 48a-49a, 111a-112a. The Banneker program, established in 1978 as part of Maryland's effort to achieve Title VI compliance, provided merit-based scholarships to minority students at UMCP. *Id.* at 111a, 127a-128a & n.10. In response to UMCP's plan, OCR recommended increased recruitment efforts and an increase in the number and amount of merit-based scholarships for black students. *Id.* at 127a n.10. OCR accepted Maryland's 1985-1989 plan as "compliance with Title VI for the life of the plan." *Id.* at 48a. Maryland indicated that it intended to continue to follow the plan at least until completion of the OCR review. *Id.* at 48a-49a. From 1985 to 1989, Mary-

land provided more than $7,900,000 worth of "other-race" financial assistance to students pursuant to the plan, approximately $2,400,000 at historically black schools and $5,500,000 at other institutions. See Gov't D. Ct. Br., App. C.

Based upon its experience with the Banneker program during the preceding ten years and an evaluation of its effectiveness, Maryland refined the program in 1988 by increasing the amount of assistance to full four-year scholarships for tuition, room and board; at the same time it narrowed the eligible applicant pool to black students. Pet. App. 47a-48a & n.41, 98a-99a. UMCP did not set an exact number of Banneker scholarships to be awarded, although its practice was to award at least 20 Banneker scholarships annually. *Id.* at 48a, 98a, 132a. Nonetheless, the Banneker program accounted for only approximately one percent of UMCP's annual financial aid budget. *Id.* at 35a-36a, 87a & n.76.

All students, irrespective of race, could compete for scholarships with identical benefits under Maryland's Francis Scott Key Scholars Program (Key program), which awarded approximately twice as many scholarships as the Banneker program. Pet. App. 5a, 83a, 99a n.2.[1] The academic credentials required to be eligible for the Key program were somewhat more rigorous than the Banneker program. *Ibid.* In 1990, the year respondent entered UMCP, black students received two of the 52 Key scholarships awarded. *Id.* at 83a.

Only since the late 1980s has Maryland made "any genuine progress towards eliminating its single race status"; this progress has been the result in part of the Banneker program. Pet. App. 49a, 130a.[2] When this suit was

---

[1] Respondent also challenged the validity of the Key program but the court rejected that challenge, Pet. App. 134a-137a, and respondent no longer pursues that claim.

[2] The district court noted that it took UMCP "from 1975 to 1983 to increase its black enrollment from 6.8% to 8.1%. Later in the

filed in 1990, the UMCP student population was 11.2% black. *Ibid.* OCR currently is in the process of determining whether Maryland's implementation of its system-wide desegregation plan has eliminated the vestiges of the *de jure* system of racial discrimination in accordance with the standard set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992). Pet. App. 48a, 111a.

At the time he filed this lawsuit in 1990, respondent was a 19-year-old male of Hispanic descent who had been granted admission to UMCP in 1989 to enter as part of the freshman class in the fall of 1990. He was found to be ineligible to receive a Banneker scholarship because he is not black. Pet. App. 99a. He was not eligible for a Key scholarship because he did not have adequate academic credentials. *Id.* at 5a, 134a. Respondent filed this lawsuit against UMCP, alleging that the Banneker scholarship program violated, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. Pet. App. 97a.

2. The district court examined the Banneker program to determine whether it survived a strict scrutiny analysis under the Equal Protection Clause.[3] The court entered summary judgment for defendants based on its conclusion that there was a strong basis in evidence that remedial action was necessary in light of the administrative findings of OCR and that the program served a compelling government interest and was narrowly tailored to achieve that goal. Pet. App. 109a-137a.

3. The court of appeals reversed, concluding that the district court needed to make specific findings about whether there was a sufficient present effect of UMCP's

---

decade, the same 1.3% increase took only two years—between 1988 and 1990 the percentage of black undergraduates increased from 9.9% to 11.2%." Pet. App. 49a n.44.

[3] The court noted that Title VI standards are coextensive with those of the Fourteenth Amendment. Pet. App. 121a; see also *Fordice*, 112 S. Ct. at 2738 n.7 ("the reach of Title VI's protection extends no further than the Fourteenth Amendment").

past racial discrimination against blacks to justify maintenance of the race-based Banneker scholarship program. Pet. App. 96a-108a.

4. On remand, several black students at UMCP who had received Banneker scholarships and their parents were permitted to intervene as defendants. Pet. App. 35a n.2. UMCP conducted an extensive administrative review of the Banneker program to determine whether to continue the program and invited participation in that review by all parties to the litigation. In a 1993 Decision and Report (*reproduced at* Pet. App. 139a-220a), UMCP concluded that "the Banneker Program is a highly effective means for countering significant lingering effects of the University's historical identity as a discriminatory institution." *Id.* at 220a. It found that the program "also supports the University's efforts to create and sustain the diverse campus community identified as essential to providing a high-quality education." *Ibid.* UMCP concluded that continuing effects of the racially discriminatory dual system persisted at UMCP and influenced enrollment decisions of black students and that the Banneker Program was necessary to remedy those continuing effects.

The district court allowed additional discovery, received cross-motions for summary judgment based on extensive evidence including the 1993 University report, and made detailed factual findings. The court ruled that UMCP had presented a strong evidentiary basis showing four present effects of past racial discrimination: (1) UMCP has a poor reputation within the African-American community, particularly among parents and counselors who influence students' college choices; (2) African-Americans are underrepresented in the UMCP student population; (3) African-American students at UMCP have low retention and graduation rates; and (4) the UMCP campus atmosphere is perceived as hostile to African-American students. Pet. App. 50a-81a. The court cited evidence of, for example, first-hand accounts of current students who were urged not to attend UMCP because of its racially discrim-

inatory environment; statistical evidence of underrepresentation and attrition rates; and survey evidence regarding racially hostile campus environment, including, for example, separate homecomings for whites and blacks. The court concluded that remedial action to redress the prior racial discrimination remained necessary at the time respondent applied for a scholarship and that the Banneker program was narrowly tailored to remedy the effects. *Id.* at 81a-89a. The court entered summary judgment for petitioners and denied respondent's summary judgment motion.

5. The court of appeals reversed the district court's grant of summary judgment for petitioners and ordered that summary judgment be entered for respondent. The court ruled that, because the Banneker scholarship program excluded other races, UMCP was "burdened with a presumption" that the program could not be sustained. Pet. App. 6a. It held that, in order for present effects of discrimination to justify the program, petitioners had to "prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." *Id.* at 9a.

The court of appeals concluded that two of the present effects of past discrimination found by the district court—UMCP's poor reputation in the African-American community and the racially hostile campus environment—were not sufficient to justify the Banneker program. Pet. App. 10a. It believed that the poor reputation constituted "mere knowledge of historical fact[s]" of UMCP's prior discrimination and that is "not the kind of present effect that can justify a race-exclusive remedy." *Ibid.* The court rejected the district court's conclusion that the racially hostile UMCP campus environment was connected to UMCP's past discrimination. It reasoned that the incidents "do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." *Id.* at 11a.

With regard to the remaining two effects relied upon by the district court, the court of appeals held that they also could not justify the district court's decision. As for the district court's findings of strong evidence of low retention and graduation rates among African-Americans, the court of appeals ruled that genuine issues existed, including dispute as to the reason why African-Americans leave UMCP in greater numbers than other students. Pet. App. 14a. With regard to underrepresentation of African-Americans among entering students, the court believed there were remaining factual disputes about UMCP's minimum admission criteria and the relevant applicant pool. *Id.* at 15a-18a.

Rather than remanding the case to the district court for trial to resolve those factual disputes, the court of appeals ordered that summary judgment be granted to respondent. The court ruled that, even assuming the validity of the proffered justifications of racial underrepresentation and higher attrition rates related to past discrimination, the Banneker program was unlawful because it was not narrowly tailored to remedy those two effects. The court noted that the narrowly tailored determination was difficult to make because "the proof of present effects is so weak." Pet. App. 19a. The court found that the Banneker program effectively recruited only high-achieving African-Americans and high achievers were not the group against which UMCP had discriminated in the past. *Id.* at 20a. The court also ruled that because Banneker scholarship recipients included African-Americans who are not residents of the State of Maryland, the program was not narrowly tailored to the identified problem of not enough qualified African-American Maryland residents attending UMCP. The court found that UMCP's underrepresentation statistics failed to account for various factors and therefore led more to racial balancing than to a tailored remedy program. *Id.* at 25a. The court also found that

UMCP had not shown that it had tried any race-neutral solutions to address the retention problem. The court of appeals ordered that, on remand, the district court enter an order denying petitioners' summary judgment motion, grant respondent's summary judgment motion, and re-examine respondent's scholarship eligibility. *Id.* at 28a-29a.

In considering timely rehearing petitions, the court of appeals modified its opinion in one minor respect and denied rehearing en banc over the dissent of three judges.

DISCUSSION

The ruling in this case severely impedes the ongoing efforts of the United States Department of Education's Office for Civil Rights (OCR) to eliminate the vestiges of *de jure* segregation in state systems of higher education subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The court of appeals held that a state institution with a long and undisputed history of both *de jure* racial segregation and intentional racial discrimination may not implement, as part of an OCR-approved desegregation plan, a scholarship program to recruit and retain black students. In reaching this decision, the court of appeals incorrectly presumed that the program was invalid unless the University of Maryland, College Park (UMCP), could prove that the current racial disparities related solely to its own past discrimination, disregarded the presumption that the racial disparities in formerly *de jure* segregated education systems are related to that past segregation until proven otherwise, ignored the fact that UMCP's creation of the program was prompted by OCR's finding that it was in violation of Title VI and insistence that it take this type of remedial action, and overlooked the narrowly tailored features of the program. If left unreviewed, the decision will cause substantial confusion regarding the legal and constitutional standards

applicable to scholarship programs established by institutions attempting to remedy racial discrimination, and will also create doubt about the validity of the Department of Education's current policy guidance regarding such scholarships.

1. The court of appeals' opinion is inconsistent with the principle, recently reaffirmed by the Court in *United States* v. *Fordice*, 112 S. Ct. 2727, 2732, 2736-2737 (1992), that States that operated *de jure* racially segregated school systems have an affirmative duty to dismantle the systems and their vestiges. Under the Court's precedents, the burden is on a State to prove that it has dismantled its previously *de jure* segregated school system. *Fordice*, 112 S. Ct. at 2741; *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955). This burden is not satisfied by adoption of race-neutral policies when practices traceable to prior illegal discrimination have continuing segregative effects.

As the district court below recognized, this Court has created "aggressive affirmative duties in the area of primary and secondary school desegregation * * * and a presumption that the effects of the [previously unconstitutional] segregation continue until a court finds otherwise." Pet. App. 89a-90a, citing *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Board of Education* v. *Dowell*, 498 U.S. 237 (1991). In *Fordice*, the Court also indicated that, in determining whether current effects are related to prior unconstitutional discrimination, courts should find that they are unless it is proven otherwise. 112 S. Ct. at 2741 (rejecting district court's holding that the private plaintiffs and the United States had not established the constitutional defect of a current state policy because it "improperly shifted the burden away from the State"). The unique features of long-standing *de jure* segregation in public education, including its entrenched nature and system-wide impact, justify the presumption

that current racial disparities are traceable to formerly *de jure* segregation and the placement of the burden on a challenging party to prove otherwise. Cf. *id.* at 2745 (Thomas, J., concurring) (approving assumption that a current school policy reflects discriminatory intent if policy initially tainted and produces segregative effects).

OCR's policy similarly places upon States with a history of *de jure* segregation in their higher education system an affirmative duty under Title VI to ensure that no vestiges of those *de jure* systems continue to have a discriminatory racial effect. See Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department of Education thus has long required that a recipient of federal funds that has discriminated in the past "must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. 100.3(b)(6)(i). Following *Fordice*, the Department reaffirmed that standard and announced to States with pending Title VI evaluations that OCR will apply *Fordice* to require elimination of all vestiges of prior systemic *de jure* segregation. Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-4272 (1994).

The court of appeals' decision in this case conflicts with those principles. Instead of viewing current racial disparities as traceable to past *de jure* segregation in the absence of contrary evidence, the court instead utilized a "presumption" that action to remedy those disparities was not justified unless UMCP affirmatively proved that current conditions were traceable to its past unconstitutional discrimination. Pet. App. 6a. The court, in effect, imposed an evidentiary presumption that current racial disparities at UMCP are traceable exclusively to general societal discrimination.

The court of appeals' presumption is also inconsistent with the reasoning of the Court in both *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986)

(opinion of Powell, J.), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The Court there recognized that, where a governmental entity is attempting to remedy past discrimination and has a strong basis in evidence for doing so, the entity's remedial purpose is valid unless proven otherwise by the plaintiff. Plaintiffs challenging remedial action by a State "continue to bear the ultimate burden of persuading the court that the [government's] evidence d[oes] not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of th[at] evidence [i]s not sufficiently 'narrowly tailored.' Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the [government's] assertedly remedial action based on the statistical evidence was justified." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 278 (opinion of Powell, J.); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing the remedial action is required."); *Croson*, 488 U.S. at 509 (opinion of O'Connor, J.) (state or local entity may take action to rectify effects of discrimination within its jurisdiction, and inference of discrimination may arise from statistical disparity). Here, of course, the State's reason for acting was even stronger since it sought to remedy the effects of its own prior conduct in administering an intentionally segregated higher education system.

The court of appeals not only erred in locating the evidentiary burden in establishing the validity of a remedial purpose. It also imposed on the State a heavier burden than this Court requires to justify state affirmative action programs in circumstances not involving any demonstrated history of discrimination. In such cases, the Court has required that a State have a "strong basis in evidence" to justify the need for remedial affirmative action. See *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277 (opinion of Powell, J.). By requiring a state university with a long and undisputed history of discrimination to prove that its continuing racial identifiability and racial disparities are caused solely by its discrimination and not in any part by broader social factors, the court of appeals' decision places a much higher and virtually insurmountable burden of proof on state school systems to justify needed affirmative remedies.

The court of appeals' decision places UMCP and other formerly *de jure* segregated institutions of higher education in an untenable position. On the one hand, they have an affirmative constitutional and Title VI duty to eliminate the vestiges of prior segregation under *Fordice*. For this purpose, those vestiges are presumed to be the result of the prior unconstitutional segregation. If a college or university takes affirmative steps, however, and is challenged by a suit claiming reverse discrimination, it will be held liable unless it can prove affirmatively that the remaining vestiges of segregation were caused exclusively by the school's prior discrimination and not at all by general societal discrimination. Placing a State seeking to remedy its own prior unconstitutional discrimination in this dilemma is completely inconsistent with this Court's remedial jurisprudence. See *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in the judgment) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent em-

ployment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.").

2. The court of appeals' invalidation of UMCP's Banneker scholarship program is inconsistent with the Department of Education's administrative enforcement of Title VI in Maryland and with its application of its current and past policy which recognizes that race-based scholarships may, in some circumstances, be an appropriate part of a program designed to overcome the lingering effects of past discrimination. See Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756-8764 (1994) (policy guidance); Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department's policy guidance specifically recognizes the value of race-targeted financial aid as a student recruitment tool, particularly where an institution has a reputation as being inhospitable to minority students. 59 Fed. Reg. 8761 (1994). Scholarship programs function as an incentive to attend a particular university campus both for the recipient and also for others who may see the scholarship program as a sign that the campus is open to the type of person the program targets. Attendance incentives are especially important in higher education because many remedies that have been key components in desegregation plans for elementary and high school education systems, such as student assignment, are not practically feasible in the college or university context. See *Fordice*, 112 S. Ct. at 2744, 2745 (Thomas, J., concurring); *id.* at 2737 n.5.

Scholarships like the Banneker program can, in some circumstances, help reduce the racial identifiability of an institution in ways that cannot easily be duplicated by other means. By attracting qualified minority students to apply and enroll, helping those students to stay through graduation, contributing to a strong minority alumni base, and demonstrating that a traditionally white school is interested in minority students, the scholarships address some of the more intractable effects of past discrimination. Minority-targeted scholarships like the Banneker scholarships can also increase the level of minority achievement and recognition on campus. 59 Fed. Reg. 8762 (1994).

The court of appeals' decision also fails to recognize the legal significance of the fact that OCR, the federal agency charged with administrative enforcement of Title VI at universities, had found the Maryland system of higher education to be in violation of Title VI. OCR had devoted significant resources over a period of many years to the task of desegregating Maryland's racially segregated system of higher education. In 1985, OCR urged the State to adopt and expand "other-race" scholarship programs that, like the Banneker program, are designed to attract students to state institutions where they have traditionally been absent or underrepresented, thus decreasing the racial identifiability of those institutions.

OCR has the authority to order remedies for UMCP's past discrimination. See 42 U.S.C. 2000d-1; 34 C.F.R. 100.3(b)(6)(i) and (ii), 100.5(h). Its determination that Maryland was not in compliance with Title VI established the "governmental interest in remedying past discrimination." *Croson*, 488 U.S. at 497 (opinion of O'Connor, J.), citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("judicial, legislative, or administrative findings of constitutional or statutory violations" trigger remedial interest); see also 56 Fed. Reg. 64,549 (1991). The fact that OCR continued in its efforts to have Maryland adopt

remedial measures during the relevant period reinforces the validity of UMCP's interest.

The court of appeals' decision also undermines Title VI enforcement efforts by the Department of Justice, which has pending higher education litigation in which race-based scholarships may constitute part of an overall remedy. Race-targeted financial aid constitutes an important part of the consent decree in the United States' higher education suit against the State of Louisiana, *United States* v. *Louisiana*, No. 80-3300 (E.D. La. Nov. 14, 1994), and may be a needed component of the remedy in other pending Title VI enforcement actions in Alabama and Mississippi. The decision below interferes with federal enforcement efforts both by placing overly stringent restrictions on an effective remedial device and by penalizing a state institution that was attempting in good faith to comply with a federal mandate.

3. The court of appeals' restrictive analysis of UMCP's power to remedy discrimination made it impossible for the court to make a proper determination as to whether the Banneker program was a narrowly tailored means of achieving that goal. For example, because the court did not consider the possibility that UMCP's long-standing reputation as a "white" school contributed to its difficulty in attracting qualified black applicants, it failed to take into account the program's effectiveness in changing that perception and reducing UMCP's racial identifiability. Nor did the court recognize the importance of attracting highly qualified black students likely to succeed at UMCP and stay through graduation.

Also relevant to the narrow tailoring inquiry is the fact that the Banneker program has a minimal impact on opportunities available to other students. The program does not exclude any student from admission to UMCP and it does not unduly restrict financial aid resources available to other students. The record indicates that the one percent of UMCP's financial aid budget currently

devoted to the Banneker program would otherwise likely be allocated to other desegregation programs, rather than to other scholarships. Pet. App. 87a n.76. Ineligibility for a Banneker scholarship therefore does not impose the burden of achieving racial equality on particular individuals. Cf. *Wygant*, 476 U.S. at 282-283; see also 59 Fed. Reg. 8762 (1994). This fact weighs heavily in the determination whether UMCP's remedial program is narrowly tailored. The court of appeals also disregarded the fact that the Banneker program was not permanent, was susceptible to further refinement as the changes in 1988 evidenced, was subject to periodic review, and was flexible regarding the number of awards made annually.

* * * * *

The Court should grant review in this case in order to correct the court of appeals' erroneous application of a presumption that UMCP's remedial scholarship program was invalid. The judgment of the court of appeals should be vacated and the case remanded for a determination of the validity of the program under the correct constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
LESLIE A. SIMON
Attorneys

MAY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20068

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

No. 94-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

*JANELL M. BYRD
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Petitioners

TABLE OF CONTENTS

Page

Table of Authorities i

REPLY BRIEF FOR PETITIONERS 1

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994) 5

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 3, 4

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) 5

Hammon v. Barry, 826 F.2d 73 (D.C. Cir.), cert. denied, 486 U.S. 1036 (1988) 5

United States v. Fordice, ___ U.S. ___, 112 S. Ct. 2727 (1992) 2

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1621

MONICA GREENE, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

I

The *Brief of Respondent in Opposition* continues the consistent refusal of Mr. Podberesky, throughout this litigation, to acknowledge either the breadth and scope of Maryland's discriminatory exclusion of its African-American citizens from higher educational opportunities, or the State's long delay in taking any effective actions to overcome the legacy of segregation at the College Park campus -- which further entrenched the school's identity as a "white institution" despite the State's formal policy of admitting students without regard to race.

Respondent's approach is reflected at the outset in his restatement of the Questions Presented. The first question that he frames describes the University of Maryland as having "at least 40 years ago eliminated all policies and practices -- traceable to the segregative era -- which had segregative effects." It is undisputed, though, that all the University did in 1955 was to eliminate its formal policy of absolutely excluding African-American students from admission as undergraduates. Discrimination against blacks

and discouragement of their attendance at UMCP in more than the most token numbers continued to be the operative policy of the State of Maryland until after OCR acted in 1969. See Pet. in No. 94-1620, at 7-8; Pet. App. at 38-44; UX 70 at 157-70.

Respondent's description of the context in which the University of Maryland adopted the Banneker Program thus is contrary to the record. It also is at odds with this Court's admonition in *United States v. Fordice*, ___ U.S. ___, ___, 112 S. Ct. 2727, 2736 (1992), that

> the adoption and implementation of race-neutral policies alone [does not] suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.

Compare Brief for Respondent in Opposition, at 14 ("UMCP has maintained race-neutral admissions procedures since 1954. Accordingly, UMCP has at all times since 1954 done all that is required of it under *Fordice*").

The court below exhibited the same myopic view of the effects of pervasive discrimination, *see, e.g.*, 38 F.3d at 154, Pet. App. at 10a ("any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students"); *compare* Pet. in No. 94-1621, at 17-18 n.18.

As the Solicitor General has indicated to this Court, the decision below is inconsistent with *Fordice* and will, if left standing, impede the federal government's efforts to obtain effective remedies to enforce Title VI. *See Brief for the United States as Amicus Curiae Supporting Petitioners*, at 12-13, 18. The petitions should be granted to correct the

errors and remove the impediment to full constitutional compliance.

II

Respondent's *Brief in Opposition* is also remarkable for its complete failure to address the second and third Questions Presented by the Greene Petitioners. In particular, Respondent's silence indicates clearly the lack of any coherent justification for the inconsistent actions of the court below, when it first reversed the trial judge's grant of summary judgment for one party because there were material facts in dispute, and then directed entry of summary judgment for the opposite party notwithstanding those factual disputes. We continue to believe that the lower court's error in this respect is so clear as to warrant summary reversal and remand by this Court, see Petition in No. 94-1621, at 29 n.28.

III

We argued in our Petition (at 15-17) that this case merits review because it raises important issues that are distinct from those which the Court has addressed in prior decisions involving voluntary affirmative action. Respondent asserts, to the contrary, that the court below "simply follow[ed] clear-cut authority from this Court" (*Brief in Opposition*, at 11), and that its ruling is consistent with the "unanimous" holdings of the federal courts of appeals (*id.* at 17). Respondent substantially misrepresents the decisions he cites in an effort to force them into the Procrustean mold of his argument.

Respondent contends that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), govern this case. He charges that we engage in "a clear misreading" of those opinions when we seek to distinguish *Croson* and *Wygant* because in

each of those matters, "the allegedly remedial racial classifications were adopted 'in the absence of any findings of discrimination'" (*Brief in Opposition*, at 13). That contention cannot be squared with the Court's clear statement in *Croson* that:

> In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race.

488 U.S. at 505. Nor is Respondent's reading of *Wygant* any more faithful to the text of the plurality opinion:

> Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. . . . [A] public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination. . . . Despite . . . years of litigation and three separate lawsuits, no such determination has ever been made.

476 U.S. at 277-78.

Wygant, says Respondent (*Brief in Opposition* at 13), "makes clear that . . . the focus should be on whether there exist *present effects* of past racial discrimination. *Wygant*, 476 U.S. at 274 (plurality opinion) [emphasis in original]." But the distinction that Respondent apparently seeks to make simply does not appear in the *Wygant* plurality opinion, either at the page cited in Respondent's brief or elsewhere.

Respondent's treatment of the rulings of the Courts of Appeals is similarly flawed. Neither *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994), nor *Hammon v. Barry*, 826 F.2d 73, 76-77 (D.C. Cir.), *cert. denied*, 486 U.S. 1036 (1988), discussed whether a "reputation for discrimination in the distant past [w]as sufficient justification for a race-based remedial program," *Brief in Opposition*, at 17. In both cases, the Courts of Appeals found that statistical evidence was insufficient to support an inference of discrimination, either because there was inadequate information about the makeup of the qualified labor pool, *Brunet*, 1 F.3d at 407, or because the comparison showed no underrepresentation, *Hammon*, 826 F.2d at 77-78.

Respondent also attempts to brush aside the ruling in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), asserting that the case "involved the validity of a consent decree, an issue not present here . . . [and the Court of Appeals] based its decision in part on an unwillingness to overturn a settlement supported *by all parties* after 16 years of litigation" (*Brief in Opposition*, at 26 [emphasis added]). In fact, in *Geier* the United States *appealed* from entry of a decree to which all other parties gave their consent, and it unsuccessfully advanced the same contention that animates the decision below and Respondent's argument to this Court: "that the illegal condition of segregation in public higher education in [a State] was cured by adoption of an open-admissions policy and . . . good-faith recruitment efforts," *Geier*, 801 F.2d at 805.

In sum, notwithstanding Respondent's efforts to reframe the issues, this case presents important and substantial legal questions that have not yet been addressed by this Court, in the context of a ruling by the Fourth Circuit that is a marked departure from this Court's rulings

and that contrasts sharply with the holdings of other federal courts. The Petitions should be granted.

Conclusion

For the reasons stated above as well as those in the Petition, the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

Respectfully submitted,

WILLIAM J. MURPHY
JOHN J. CONNOLLY
MURPHY & SHAFFER
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

*JANELL M. BYRD
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1275 K Street, N.W., Suite 301
Washington, D.C. 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Petitioners